Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MILES JAY GOPMAN,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What are the constitutional limits upon the power of a state's highest court to delegate unto its "integrated" state professional association of attorneys regulatory authority to discipline its own members, when as in the case of the Florida Supreme Court, it has declared The Florida Bar to be a part of judicial branch of the government, and what minimum procedures are required in bar disciplinary proceedings to meet standards of fairness required by the Fourteenth Amendment?

2. What degree of regulation may a state's highest court exercise over an attorney acting solely in a pro se capacity without infringing upon the rights guaranteed by the First, Sixth and Fourteenth Amendments, especially when, as in this case, the sanctionable conduct concerns statements made in written motions in the course of his self-defense, and what standards and procedures must be applied before disciplinary sanctions can be constitutionally imposed?

3. Did the Florida Supreme Court unconstitutionally infringe upon Petitioner's protected rights and liberty interests in violation of concepts of substantive due process with the Fourteenth Amendment, when it placed him on indefinite probation and under threat of contempt and future suspension, so as to enable The Florida Bar to compel his submission to comprehensive psychological evaluation and treatment through a program affiliated with The Florida Bar?

PARTIES TO THE PROCEEDING

The petitioner is Miles Jay Gopman. The respondent is The Florida Bar, which is an official arm of the Florida Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Miles J. Gopman ("Petitioner"), respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Florida in this case.

OPINIONS BELOW

The opinion of the Florida Supreme Court (App. A-1-3) is unreported. The order denying Petitioner's motion for rehearing (App. C-1) is also unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the final order rendered by the highest court of a State.

The Florida Supreme Court entered its final order on October 18, 2005. App. A. On November 10, 2005, within the period provided in the court's order granting enlargement of time, Petitioner filed a motion for rehearing. On February 6, 2006, the Florida Supreme Court filed an order denying the motion for rehearing. App. C.

On May 6, 2006, Petitioner made a motion before this Court requesting an extension of time within which to file a petition for a writ of certiorari. On May 15, 2006, Justice Thomas granted the motion extending time to and including June 9, 2006.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Question I: Article IV, Section 4; Article VI, Section 2 (Supreme Law of the Land); Amendment XIV of Constitution of the United States.

Question II: Amendments I, V, VI, XIV of Constitution of the United States.

Question III: Substantive Due Process guaranted by Amendment XIV of Constitution of the United States.

REGULATORY FRAMEWORK

In a 1972 amendment to the Florida Constitution adopting Section 15 to Article V, the exclusive jurisdiction of Florida's Supreme Court to regulate and discipline persons admitted to the practice of law was established. Thus, the Florida Supreme Court has original jurisdiction over cases related to attorney regulation and discipline by direct review, rather than by its exercise of appellate jurisdiction. *Florida Bar v. McCain*, 330 So. 2d 712, 714 (Fla. 1976); *Florida Bar v. Moses*, 380 So. 2d 412, 413-16 (Fla. 1980). Article V, Section 15 did more than just codify the inherent power, which the court has always possessed over the practice of law. For this amendment transformed what had been the court's original jurisdiction, concurrent with Florida's legislature, into the "exclusive" domain of the court.[1]

In fact, it was through the court's exercise of its inherent, original jurisdiction over the practice of law, and its police powers incident thereto, that all attorneys admitted to practice in Florida were "integrated" into a unified state bar association, so as to be made subject to a membership fee as an obligation of membership in the statewide bar. *See Petition of State Bar Association*, 40 So. 2d 902, 905-06 (Fla. 1949). Thereafter, this "integrated" association of Florida attorneys became known as The Florida Bar. *See* Bar Rule 1-1.1 (Name) and Rule 1-3 (Composition). It has been delegated regulatory and enforcement authority as "an official arm of the court." *In re Amendments to Rules Regulating The Florida Bar*, 605 So. 2d 252, 258 (Fla. 1992).

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[1] *See Petition of Florida State Bar Association*, 186 So. 280, 285 (Fla. 1938), describing the legislative history related to attorney admissions and disbarment.

The Florida Bar is governed by a Board of Governors composed of delegates elected from each judicial circuit throughout the state. Bar Rules 1-4.1 and 1-4.2(a). Consequently, the Board of Governors is the body to which the actual responsibility for enforcing the disciplinary rules and procedures was transferred. Bar Rule 1-8.1. In addition, the Board exercises regulatory power over all members of The Florida Bar through its authority to review and file proposed amendments to the rules of professional conduct for approval by the court. Bar Rules 1-10.1 and 1-12.1(c), (h).

The Florida Supreme Court has also transferred investigatory and enforcement power to local, circuit court grievance committees and referees, by designation as disciplinary agencies of the court, though, in theory, the Board of Governors has ultimate responsibility for supervising the conduct of disciplinary proceedings. Bar Rules 3-3.1, 3-3.2(a)-(b) and 3-3.4(a), (c). To this end, a member of the Board is assigned to each grievance committee as its "Designated Reviewer," whose responsibilities include the selection of the presiding officers of a circuit grievance committee; control over a voting quorum through the division of a grievance committee into three member panels; and the review of grievance committee actions. Bar Rules 3-2.1(p), 3-3.4(e) and 3-7.4(g), (l).

The Board of Governors also exercises supervision and control over disciplinary proceedings through the employment of staff attorneys under the direction of its Executive Director. Bar Bylaw 2-4.3; Bar Rules 3-2.1(h) and 3-3.3. A staff attorney becomes the designated Bar counsel in connection with any grievance or disciplinary matter to which he is assigned, acting thereby in the name of The Florida Bar. Bar Rules 3-2.1(a), 3-7.4(c), (p) and 3-7.6(e).

The designated Bar counsel performs both an investigatory and prosecutorial function on behalf of The Florida Bar. Bar Rules 3-7.3(a), (b) and 3-7.6(g). In these capacities, Bar counsel has unbridled discretion to either pursue an investigation or not – Bar Rules 3-7.3(a), (b); and to

either dismiss a grievance committee case or recommend specific action before a grievance committee – Bar Rules 3-7.3(d), (f); and as to what charges of misconduct a grievance committee will consider – Bar Rule 3-7.4(c); and whether to recommend the diversion of a disciplinary case to a professionalism enhancement program either at the grievance committee stage, or after formal proceedings filed in the Florida Supreme Court are before a referee – Bar Rules 3-7.3(d), 3-7.4(o), 3-5.3(b), (d) and 3-5.3(h); and whether to recommend treatment of the violation as "minor misconduct" subject solely to a disciplinary admonishment – Bar Rules 3-5.1(a) and 3-5.1(b)(1)-(3).

An accusation of attorney misconduct can be initiated by Bar counsel, in which case the complainant is The Florida Bar. Bar Rules 3-2.1(c), (m). However, the Bar's regulatory jurisdiction over its members goes beyond "the standards and ethical and professional conduct prescribed by this court" – for which notice knowledge is mandated in Bar Rule 3-4.1, but extends to an open-ended category of misconduct not enumerated or specified in the rules of professional conduct "that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations or otherwise . . . and whether or not the act is a felony or misdemeanor." *See* Bar Rule 3-4.3 (Misconduct and Minor Misconduct). As such, Bar counsel has discretion both to initiate a disciplinary case based upon "any act" he deems to be "unlawful or contrary to honesty and justice," and to treat same as either minor misconduct or otherwise.

Other rules enable Bar counsel to exercise substantial control over the record and scheduling of proceedings before both a grievance committee and a referee. Although Bar Rule 3-7.4(h) gives a respondent attorney the right to respond in writing to the charges being investigated and the materials considered, it remains within the prerogative of Bar counsel to *permit* the respondent to personally appear before a grievance committee only when "required to testify and produce evidence as any other witness." Rule

3-7.4(l) requires Bar counsel to prepare a record of investigation before the grievance committee and a formal complaint purportedly thereupon, however, the contents of the record are dependent upon what materials he "furnished to or received from respondent."

The referee appointed to hear the disciplinary case on the formal complaint filed in the Florida Supreme Court will ordinarily be an active judge of circuit court governing the county from which the grievance committee case arose. Bar Rules 3-2.1(l) and 3-7.6(a), (d). Because the "adversary proceeding" to be tried on the formal complaint comes before a referee upon a finding of "[probable] cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action," through an assignment from the Chief Justice of the Florida Supreme Court as provided in Bar Rule 3-7.6(b), the referee is hardly free to second-guess the allegations of misconduct in those instances where charges have been initiated by The Florida Bar, itself, as "an official arm of the court."

As such, the referee will be predisposed to defer to The Bar's interest as to the timing and amount of notice to respondent for final hearing – Rule 3-7.6(i); and to accept The Bar's position on whether that act in question constitutes misconduct in violation of a disciplinary rule – Bar Rule 3-7.6(m)(1)(A), (B); and to rely on the Bar's interpretation of sanction standards on what disciplinary measures should be applied – Bar Rule 3-7.6(m)(1)(C); and as to the costs to be taxed in favor of the Bar – Rule 3-7.6(m)(1)(E). Departing from the prevailing party rule operative in civil litigation in Florida, the referee will assess The Bar's costs against the respondent whenever "the bar is successful, in whole or in part." Bar Rule 3-7.6(q)(3). Furthermore, those costs include a so-called "administrative fee in the amount of $1,250.00," plus other administrative expenses, not normally recoverable in civil litigation such as "investigative costs, including travel and out of pocket expenses," "copy costs," "telephone charges," and "travel and out-of-pocket expenses of the referee" and

"of counsel in the proceeding." *See* Rule 3-7.6(q)(1). These cost assessments are problematic in terms of Florida's Constitution, Article I, Section 18 (Administrative Penalties)[2]; and Article I, Section 21 (Access to courts).[3] They also raise a concern with regard to this Court's holding in *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990) as to whether The Florida Bar is using the "compelled association and integrated bar" to generate revenues from disciplinary proceedings to fund legislative activities constitutionally prohibited by *Keller*.[4]

The "adversary proceeding" before the referee is more akin to an arbitration than a normal trial. As stated in Bar Rule 3-7.6(f)(1), the nature of a disciplinary proceeding is "administrative in character," being "neither civil nor criminal but is a quasi-judicial administrative proceeding." Thus, the rules of civil procedure do not apply where "otherwise provided in this rule." For example, Florida Civil Procedure Rule 1.440(c) provides that a case shall not be set for trial "less than 30 days from the service of the notice for trial." By contrast, when the referee fails to set a final hearing date at a pretrial conference, as required by Bar Rule 3-7.6(c), the final hearing may be set "upon not less than 10 days' notice," plus 5 days additional time for the service by mail. Bar Rules 1-13.1(b) and 3-7.6(i). No filing system exists apart from the referee's own. No docket or intake procedure exists. The setting of hearings and issuance of subpoenas depends on the referee's availability.

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[2] "No administrative agency . . . shall . . . impose any . . . penalty except as provided by law."

[3] "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

[4] *See* Florida Bar Journal Directory (September 2005) at p. 32 showing at 1.7% of The Florida Bar's revenues for fiscal year 2005-06 came from "cost recoveries [in] lawyer regulation", and a matching 1.7% of expenditures for this fiscal year were for legislation.

The procedures before a referee, as described under Bar Rule 3-7.6, also contain far fewer procedural and substantive safeguards against arbitrary and capricious state action than every other regulated trade or licensed profession is afforded under Florida's Administrative Procedure Act ("APA"), Chapter 120 et seq., Florida Statutes. Florida's APA covers all executive departments and state officers. Fla. Stat. § 120.52(1)(a), (b)(1). As a statutory constraint against unbridled agency discretion or against a proposed or existing rule that is either vague, or arbitrary, or capricious, Florida declares all such rules and agency actions thereon to be "an invalid exercise of delegated legislative authority." Fla. Stat. § 120.52(8). Anyone affected by a rule or proposed rule on the grounds that the rule is an invalid exercise of delegated legislative authority may seek an administrative determination of its invalidity before and independent and neutral administrative law judge. Fla. Stat. § 120.56(1)(a)-(e).

Anyone whose substantial interests are affected or determined by state agency may request an administrative proceeding that involves disputed issues of material fact heard before an independent and neutral administrative law judge. Fla. Stat. §§ 120.569(1) and 120.57(1)(a). As Section 120.57(1)(b) expressly assures, the affected party has the right "to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed finding of fact and orders, to file exceptions to the presiding officer's recommended order [etc.]."

Although Florida's APA was never applicable to the courts – Fla. Stat. § 120.50(2), it was not until 1993 that the Florida Supreme Court had occasion to hold the APA inapplicable to attorney disciplinary case. *Florida Bar v. Daniel*, 626 So. 2d 178 (Fla. 1993). So it may be noteworthy that only after the 1972 passage of Article V, Section 15, does the court cast a judicial shield against legislative intrusion into matters of lawyer regulation. However, as noted above, historically this had not been true in Florida.

In fact, for over 100 years, dating back to 1822, Florida's legislature had regulated matters of admission and disbarment, to which the courts "acquiesced and approved repeatedly." *Petition of Florida State Bar Association*, 186 So. 280, 286 (Fla. 1938). There the Florida Supreme Court recognized the concurrent authority of both the courts and legislature by supplementing statutory procedures with court rules providing for additional disciplinary procedures. *Id.* at 290-91. Those procedures entailed the establishment "in each judicial circuit of the state a circuit court commission" with power to investigate and report charges of unprofessional conduct to the circuit court, for issuance of a rule to show cause to the accused attorney, upon which the charges of unprofessionalism would be tried. *Id.* Most significantly, those procedures assured the accused attorney "an opportunity to appear before the commission . . . to personally or by counsel present to the commission any evidence or argument in his behalf." *Id.*

When membership in the state bar association became a mandatory condition to admission to the practice of law in the courts of Florida, by virtue of the 1949 decision in *Petition of Florida State Bar Association*, 40 So. 2d 902, 909 (Fla. 1949), the court had to confront the objection that "the integrated bar makes one's right to practice law dependent on the caprice of his competitors." It deflected this concern by reassuring "the investigation and trial of a lawyer for unprofessional conduct must a judicial proceeding," and citing the manner described in "*Petition of State Bar Association*, 186 So. 280." *Id.* at 907.

In the early years following integration, the court would continue to adhere to the "doctrine long established . . . that the investigation and trial a lawyer for unprofessional conduct must be a judicial proceeding." *Petition for Revision of, or Amendment to, Integration Rule of Florida Bar*, 103 So. 2d 873, 875 (Fla. 1956). Hence the paradigm of *Petition of State Bar Association*, 186 So. 280 (1938) was applied to proceedings before the Board of Governors in

State v. Grant, 85 So. 2d 232, 235-36 (Fla. 1956), in order to "assure against an accused party being subjected to trial without appropriate determination that probable cause exists." Those assurances required the Board of Governors and grievance committees to "in every instance give the accused attorney an opportunity to explain or refute the charges made against him," which included "a private hearing upon the charges" before the Board of Governors, and "to be heard and to present testimony and evidence." So, from this historical perspective, the procedures presently employed in The Bar's "quasi-judicial administrative proceeding" fail to provide the due process safeguards that had traditionally been applied to assure that attorney disciplinary proceedings were judicial in nature.

From a broader historical perspective, the judicial nature of attorney discipline had not been problematic until the rise of the "unified bar" through the movement to integrate state bars during the first half of the 20th Century. Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 Geo. J. Legal Ethics 911, 917-20 (Spring, 1994). Initially, as the result of work of the ABA's Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee) and its 1970 report to the American Bar Association, recommended reforms were aimed primarily at centralizing discipline under the control of the state's highest court, the streamlining the disciplinary process, and the hiring of a full-time professional staff to initiate investigations into allegations of attorney misconduct. *Id.* at 921-23, 926-27. To whom the professional staff would owe allegiance, and the independence of the disciplinary board from the state bar was not clarified in the ABA's model structure for lawyer discipline adopted on the strength of the Clark Report. *Id.* at 928-29.

In 1989, the ABA commissioned a study to report on the implementation of the Clark disciplinary model, called the McKay Commission, whose report was adopted by the ABA in February 1992. *Id.* at 930-31. The recommendations of

the McKay Report go beyond its predecessor in Recommendations 5 and 6, requiring the independence of Disciplinary Officials and of Disciplinary Counsel, from elected and appointed officials of the state bar. App. P-1, P-5-15. In doing so, the McKay Report gave thorough consideration to the decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990). Still, the questions herein over the constitutionality of the lawyer regulatory system in Florida, given the degree to which The Florida Bar has come to dominate the system, go beyond the claimed unconstitutional infringements upon attorneys admitted to practice in Florida, to impact all citizens of Florida in their expectation of a Republican form of government guaranteed by Article IV, Section 4 of the United States Constitution, though their injury is probably too general and impersonal for any non-lawyer to ever have standing to complain.

For example, in *In re Florida Bar*, 316 So. 2d 45, 46-47 (Fla. 1975), the court exempted "the Board of Governors, officers of the Florida Bar, referees appointed by The Florida Bar, and other officials of The Bar" from financial disclosure laws applicable to all state officials, on the theory that The Florida Bar is "a public agency of the judicial branch of government," so that Florida's "legislature has no power . . . to adopt ethical codes of conduct which would govern the judiciary . . . " Similarly, in *Lewis v. Florida Bar*, 372 So. 2d 1121, 1122 (Fla. 1979), the court exempted The Florida Bar from documentary taxes, because: "The Florida Bar is an arm and part of the judiciary, and one of the three co-equal departments of state government."

In Florida, the only state agencies authorized to exercise executive power are those state departments and licensing boards expressly described in Article VI, Section 6. The Florida Bar is not among them. So, that Section together with Florida's separation of powers doctrine stated in Article II, Section 3, militates against a judicial transformation of the "integrated" bar into "a public agency of the judicial branch," and co-equal part of state

government. In any case, the treatment of an "integrated" as the professional equivalent of a closed-shop union in both *Lathrop v. Donahue*, 367 U.S. 820 (1961) and *Keller v. State Bar of California* should render this transformation unconstitutional.

STATEMENT OF THE CASE

A. Criminal Case

On January 31, 2001, Petitioner took Bruce Landsdof, a 53-year old disabled man suffering from chronic schizophrenia, who had been placed by his guardian in care of Vivian Gopman, the Petitioner's wife, to the Economic Benefits Office of the Department of Children and Families, located in North Miami, Florida. Petitioner explained to a case worker that Mr. Landsdof needed assistance in applying for benefits and/or placement in a licensed facility. As the arrest affidavit shows, the next day, on February 1, 2001, Petitioner was arrested inside of his residence and charged with neglect of disabled adult without causing harm, which is a felony of the third degree. (Fla. Stat. § 825.105). Simultaneously, Petitioner's wife was arrested for operating an assisted-living facility without a license.

On February 22, 2001, Petitioner's appeared for an arraignment before Dade Circuit Judge Maria Espinosa Dennis and filed a motion to dismiss for absence of probable cause, requesting an adversarial hearing. The Petitioner was presented with the unfiled, undated, unsworn and unsigned charging document, which showed on its face that it was prepared by an intake prosecutor, named Jane Hyde. The arraignment was rescheduled for the next day. Upon reappearing before Judge Dennis on February 23, 2001, Petitioner was presented the same charging document, which by that time had been signed by someone other than intake prosecutor Jane Hyde. In addition, the charging document contained irregularities in certification, and it contained improperly consolidated charges

against both Petitioner and his by then estranged wife, Vivian Gopman. The charging document had been filed with Judge Dennis's courtroom clerk rather than with the Clerk's Office, contrary to Florida law and the Florida Rules of Criminal Procedure. At that time, the Petitioner requested the assistance of a public defender, who entered a plea of not guilty on his behalf.

Independent of Public Defender Office, on March 6, 2001, Petitioner filed his supplemental motion to dismiss the charges, claiming that the charging document was a product of a sham intake and certification and contained an unauthorized consolidation. On March 12, 2001, again independent of Public Defender Office, Petitioner filed his motion to suppress admissions, statements and all other information gathered as the result of the illegal arrest. On March 26, 2001, Petitioner served letters upon the Dade County Public Defender Office and Judge Dennis, requesting that the public defender to be discharged at that stage of the proceeding.

On March 28, 2001, when the matter came before the court, Judge Dennis conditioned the Petitioner's right to discharge public defender upon the completion of competency evaluation. The court sua sponte issued an "expedited" order appointing Dr. S. Ruiz to conduct Petitioner's competency evaluation, thereby avoiding the *Faretta* inquiry pursuant to Rule 3.111(d)(3) of the Florida Rules of Criminal Procedure. On April 9, 2001, Petitioner moved to strike order appointing Dr. S. Ruiz to determine his competency based upon lack of procedural necessity and authority, and concerns over qualifications of Dr. S. Ruiz. On the same day, Petitioner filed a motion for formal order discharging Office of Public Defender and a motion to disqualify Judge Dennis.

On April 11, 2001, because of the concerns Petitioner had raised over the qualification of Dr. S. Ruiz, Dade Circuit Judge Peter Lopez, substituting for Judge Dennis, appointed "L. Harber in lieu of S. Ruiz" to perform the expedited evaluation, and directed him to file his report by

April 25, 2001. On the same day, Petitioner submitted to the competency evaluation by forensic psychologist Leonard Harber. Later on the same day, Dr. Harber issued his report, which raised no competency issue. When the matter of competency report came before Judge Dennis for a hearing on April 25, 2001, she disqualified herself. Judge Dennis then transferred the case to Hon. Manual A. Crespo rather than have the Clerk's Office assign another judge, as required by the Florida court rules. On May 8, 2001, Petitioner filed a motion to disqualify Judge Crespo on the theory of transfer prejudice from Judge Dennis. On June 11, 2001, Petitioner filed Notice of Interlocutory Appeal to the 3rd DCA raising questions over the irregularities of the proceeding.

On July 30, 2001, upon the expiration of speedy trial period, Judge Crespo invited Petitioner to resolve the case by providing an immunized proffer, to which he consented. On July 31, Petitioner gave sworn testimony in the chambers before Judge Crespo and representatives of the State Attorney's Office upon assurances of immunity. Upon the direction of Judge Crespo, the entire transcript of Petitioner's immunized testimony was filed in the open court file in the Clerk's Office. On August 14, 2001, after the State breached its immunity arrangement with Petitioner, he moved for discharge upon Notice of Expiration of Speedy Trial.

On October 16, 2001, Petitioner filed a motion for a *Kastigar* taint hearing and/or to disqualify Dade County State Attorney's Office. In connection with that motion, Petitioner served letters to Judge Crespo pertaining to the *Kastigar* motion and speedy trial violations. Ultimately, on March 25, 2002, Judge Crespo granted the Petitioner's request for an evidentiary hearing, during which the motion to suppress was granted, and the case was dismissed for the lack of probable cause. After internal review, the Dade County State Attorney Office "decided not to take an appeal."

B. Disciplinary Proceeding

On February 19, 2003, William Mulligan, who is a staff attorney for Miami office of The Florida Bar, initiated a bar investigation against the Petitioner in connection with his motions for disqualification and court correspondence filed in the above-described criminal case. Petitioner responded by questioning the documentation, which the Bar counsel relied upon. On February 25, 2003, the Bar counsel scheduled a "paper hearing" to take place on March 26, 2003, before a Dade County Grievance Committee upon the questioned documents. App. J. The Bar counsel refused the Petitioner's requests to attend.

On January 21, 2004, The Florida Bar filed a formal complaint against Petitioner in the Florida Supreme Court. App. K. Attached as the first exhibit to the Bar's complaint was the suppressed and dismissed charging document from criminal case F-01-003508. *Id.* at 1. Remaining exhibits consisted of the Petitioner's motion for disqualification of Judge Maria Espinosa Dennis, dated April 9, 2001; and motion for disqualification of Judge Crespo, dated May 8, 2001; letter for discharge of Public Defender Office, dated March 26, 2001; letters from Petitioner to Judge Manual A. Crespo, dated October 16 and October 24, 2001, and selected appendices to his interlocutory appeal in case 3D-01-1759, dated June 14, 2001. *Id.* at 2-3, 5-6.

The complaint alleges that Petitioner violated the following Florida Rules of Professional Conduct: 3-4.3 (Misconduct and Minor Misconduct), 4-8.2(a) (Impugning Qualifications and Integrity of Judges or Other Officers), and 4-8.4(d) (Attorney's conduct prejudicial to the administration of justice), by filing "numerous documents that included statements the Respondent knew or should have known were false or that included statements made with reckless disregard as to their truth or falsity concerning the qualification or integrity of assigned judges, the State Attorney's Office, and the Public Defender's Office." *Id.* at 2, 6.

On February 2, 2004, Hon. Harry Lee Anstead, then Chief Justice of the Supreme Court of Florida, issued an order to Chief Judge of the 11th Judicial Circuit Court of Florida for appointment of a referee to conduct an evidentiary hearing upon the allegations of the Bar's complaint. App. D. Prior to the Referee's appointment, on February 12, 2004, the Petitioner filed in the Florida Supreme Court his Motion to Dismiss for Lack of Forum Jurisdiction, for Insufficiency of the Complaint and for Lack of Subject Matter Jurisdiction, in which he raised issues of constitutional privilege and preclusion.

On February 27, 2004, prior to appointment of the Referee, the Petitioner filed his response to The Bar's Request for Admissions, in which he gave as evidence for the factual basis for his filings in the criminal case the following:

> "2) Admit that the State Attorney's Office purported to charge Respondent with 'No Harm Neglect' in alleged violation of F.S. 825.102(3)(c). Denies that a charge was filed against Respondent in Case No. F-01-003508. Denies that the charging document was a true Information. Denies that the charge as alleged is a true charge. Denies that the allegations contained in the charging document constitute and offense under Florida law applicable to Respondent. Denies that the charge as alleged meets constitutional standards of due process. Also, the charge as alleged, and the underlying allegations of the arrest report lack probable cause for the alleged charge, and show further that Respondent was immune from arrest and prosecution under F.S. 825.105. In addition, the charging document arose from an illegal arrest, and violated Respondent's privileges and immunities under the United States Constitution, under the Florida Constitution, under Florida law. In addition, the charging document contains wrongfully consolidated charges, improperly joined charges, and is

> the product of a false and/or forged oath and certification. For all these reasons, the charging document was a void, invalid, defective and sham instrument."

On March 1, 2004, Chief Judge of 11th Judicial Circuit Court of Florida issued an order appointing Hon. Margarita Esquiroz to serve as a referee in The Bar's case against the Petitioner. On April 1, 2004, Judge Esquiroz issued her pre-trial order setting a calendar call for July 9, 2004 and scheduling a trial for one week period commencing July 19, 2004. The Referee scheduled hearings for June 1 and June 3, 2004 upon the Petitioner's motion to dismiss for the lack of forum and subject matter jurisdiction, and upon the Petitioner's verified motion to dismiss for sham pleadings, alleging that the Bar counsel had contrived the probable cause outcome by his use of improper and constitutionally tainted documents before the Grievance Committee. At those hearings, Petitioner testified without refutation from the Bar counsel concerning the events in his criminal case and the Bar counsel's prejudicial conduct before the Grievance Committee. The referee denied these motions. On July 1, 2004, The Bar served its motion requiring Petitioner to provide "a factual basis for statements subject to Rule 4-8.2," and notice for hearing on July 14, 2004, within a week prior to the trial. At the hearing on July 14, 2004, the Referee granted The Bar's motion without explanation or clarification as to what this would require. App. E. The referee gave the Petitioner 20 days to comply, thereby causing the trial to be cancelled. *Id.* Without Petitioner's knowledge, and outside of his presence, the Bar counsel prepared and presented the order granting its motion, which the Referee signed ex parte. *Id.* As the consequence of the events surrounding the Referee's order granting The Bar's motion requiring the factual basis for statements, on July 26, 2004, the Petitioner moved for disqualification of Judge Esquiroz as a referee. In addition, on August 2, 2004, the Petitioner moved to vacate the order, dated July 14, 2004, claiming that it was based on an irrational discovery

motion, unauthorized by Rule 1.380, Florida Rules of Civil Procedure; and the effect of that order was to raise an improper presumption against Petitioner so as to relieve The Bar of its burden of proof.

On August 10, 2004 the Referee denied the Petitioner's motion for disqualification. Concurrently, in her motion dated August 11 and filed with the court on August 16, 2004, the Referee requested the extension of time to file her report due to her vacation plans from "August 16, 2004 through September 3, 2004." That motion was granted on August 18, 2004, extending the Referee's report time until October 22, 2004. On that same day, The Bar moved to compel Petitioner to comply with the Referee's July 14th order requiring imposition of discovery sanctions in accordance with Florida Rule of Civil Procedure 1.380(b).

During this extension period, The Bar's investigator met with Judge Dennis on August 30, September 7, and September 13, 2004. On September 20, 2004, the Petitioner renewed his motion for disqualification based upon the events subsequent to August 10, 2004. On September 29, 2004, the Referee held an ex parte hearing in violation Fla. Stat. § 38.10 and Rule 2.160 of the Florida Rules of Judicial Administration prohibiting any case activity until disposition of pending motion for disqualification. That notwithstanding, the Referee issued ex parte order granting The Bar's motion and requiring Petitioner to provide a factual basis within 10 days. App. F.

Thereafter, on October 8, 2004, Petitioner served his response to referee's order on The Bar's motion to compel compliance with the July 14th order. Thereafter, Petitioner received the Referee's order denying his motion for disqualification served on October 12, 2004, although dated October 4, 2004, and subsequent to the ex parte hearing of September 29, 2004.

On October 25, 2004, after the expiration of the Referee's extended report date, she moved for another sixty-day extension of time to file her report for reasons of

"previously scheduled jury trials as well as conflicts in Bar Counsel's schedule" making it not "possible to try this case until after November 5, 2004." Due to the absence of Notice of Conflict served by the Bar counsel, the Referee's knowledge of the supposed conflict with the Bar counsel's schedule could have only been through ex parte contact. On October 27, 2004, the Florida Supreme Court issued an order extending the Referee's report time until December 27, 2004.

Thereafter, during the week of November 1, 2004, Petitioner received telephone notice from the office of Hon. Esquiroz regarding her plans to hold a final hearing in his disciplinary case on the following Monday, November 8, 2004. Thereafter, the Petitioner prepared his second renewed motion for disqualification complaining about inadequacy and impropriety of the telephone notice and apparent ex parte method by which this hearing was scheduled. This motion for disqualification was delivered to chambers on the morning of November 8, 2004, prior to the commencement of the hearing. However, once again, the Referee proceeded with the hearing in this Petitioner's absence without ruling on his motion for disqualification.

On November 24, 2004, Petitioner received a copy of The Bar's proposed report and statement of costs, in which by cover letter the Bar counsel asked the Referee to sign and file with the Florida Supreme Court without affording this Petitioner an opportunity to object or seek a modification. App. L. The Referee signed and dated that report on December 21 and filed it on December 27, 2004. App. B. Thereafter, on Feb. 25, 2005, the Petitioner filed a timely petition for review in accordance with the Bar Rule 3-7.1. The Petition for review was amended on March 3, 2005, pursuant to the order of the Florida Supreme Court granting same. App. H.

On March 3, 2005, Petitioner filed the transcripts of the hearings relevant to his petition for review with the respect to the hearings held on June 1 and June 3, 2004 upon his motions to dismiss, and on July 14, 2004, hearing

held upon The Bar's motion to require a factual basis for statements made by Petitioner in the criminal case. In addition, the Petitioner furnished the original transcript of final hearing held on November 8, 2004. Upon review of the transcript of the final hearing, this Petitioner discovered for the first time that the Referee had an ex parte meeting with the Bar counsel as late as October 19, 2004, to revalidate The Bar's witness subpoenas for already prearranged trial on November 8, 2004. The trial was conducted without holding a calendar call or pre-trial conference as required by Rule 3-7.6(c).

In addition, Petitioner discovered that the Bar counsel and the Referee had subpoenaed the circuit court judges – Hon. Dennis and Hon. Crespo – to give testimony prohibited by Rules 3(B)(9), (11) of the Florida Code of Judicial Conduct and by Rule 2.160(f) of the Florida Rules of Judicial Administration. In addition, The Bar called several Dade County Assistant State Attorneys to give incompetent testimony regarding the validity of his court filings without producing a single record or transcript from the criminal case that contradicted anything that Petitioner alleged in his filings. As demonstrated by the transcript, in the midst of the trial, The Bar changed the theory of the case from allegations of improper statements regarding judges and officers of the court to that of "disruption" of the proceeding. However, nowhere had Petitioner been notified of additional charges. In fact, The Bar Rule 4-3.5(c) specifically covers the disruption of tribunal, which violation had not been charged against him. Nor had he been charged with the violation of Rule 3-3.3(a), requiring candor towards the tribunal. Nor had he been charged 4-8.4(c), for conduct "involving dishonesty, fraud, deceit, or misrepresentation." The most egregious of the numerous instances of dishonest testimony appearing in the transcript was given by Judge Dennis, who claimed that she disqualified herself due to the Petitioner's refusal to submit to the competency evaluation. Of course, this testimony was false, and the Bar Counsel and Judge Dennis knew of its falsity as evidenced by the investigative pre-hearing

contacts with her on August 30, September 7 and September 13, 2004. Moreover, the Bar counsel used this false testimony to justify a recommended order that the Petitioner be evaluated by the Florida Lawyers Assistance, Inc., a treatment program affiliated by the Florida Bar.

In his Petition for Review to the Florida Supreme Court, as amended, the Petitioner raised numerous constitutional questions related to violations of substantive and procedural due process in his bar grievance proceeding along with claims of privilege and immunity arising under the First, Fourth, Fifth, and Sixth Amendments to the United States Constitution. In particular, the Petitioner claimed that his pro se filings in the criminal case entail protected conduct and speech not subject to lawyer regulation based upon *Faretta v. California*, 422 U.S. 806 (1975). Moreover, the Petitioner claimed that the immunity that he received from the State of Florida in his criminal case precluded the use of investigative leads and court records from the criminal case based upon this Court's decision in *Kastigar*. Lastly, the Petitioner contended the charging document and all other case filing information from the criminal case that was made part of the record in the disciplinary proceeding was tainted fruit of his illegal arrest as previously determined by Judge Crespo on March 25, 2002. Furthermore, this Petitioner raised constitutional questions in various motions filed in the Florida Supreme Court on May 3, May 5 and May 20, 2005, and in his brief filed as amended on August 24, 2005, in which he challenged the pre-trial orders requiring him to provide the factual basis for his statements as a violation of *Spevack v. Klein*, 385 U.S. 511 (1967), which effectively burdened him with an impermissible pre-trial presumption to carry the burden of proof in the guise of discovery enforcement orders.

On May 3, 2005, Petitioner filed his Motion to Prohibit and Vacate Referee's Report as the Product of a False and Tainted Charging Document in Dade Criminal Case No. F-01-003508(A). The legal grounds for the relief sought

therein were predicated upon the established constitutional doctrines announced by the United States Supreme Court in *Payton v. New York*, 445 U.S. 573 (1980) (per se violation of Fourth Amendment for warrantless arrest in residence absent exigent circumstances); *Giglio v. United States*, 405 U.S. 150 (1972) (deliberate deception of a court by presentation of knowingly false evidence violates due process); *In re Ruffalo*, 390 U.S. 544 (1968) (absence of fair notice as to reach of grievance procedure and precise nature of charges deprived attorney of procedural due process). Lastly, this Petitioner challenged the recommended disciplinary measure for him to undergo a comprehensive mental health evaluation through a treatment program funded by The Florida Bar, based upon *Griswold v. Connecticut*, 381 U.S. 479 (1965).

On October 18, 2005, the Florida Supreme Court dismissed his petition for review and denied relief on any of his substantive motions for the purported reason that Petitioner violated procedural rules and orders of the court without making reference to a single order violated or citing a single procedural rule that had not been followed. App. A. Nevertheless, the Florida Supreme Court exercised its jurisdiction to approve but not adopt the Referee's report. In addition, the Florida Supreme Court created an enforcement mechanism on behalf of The Florida Bar by placing this Petitioner on indefinite probation and authorizing The Florida Bar to compel his compliance with the recommendations in the report by means of contempt or other sanctions. Thereafter, Petitioner filed a timely motion for rehearing and clarification on November 10, 2005, in which he reiterated the procedural and substantive due process claims that the Florida Supreme Court had overlooked and substantive violations based on *Faretta v. California*, 442 U.S. 806 (1975); *Kastigar v. United States*, 406 U.S. 411 (1972), and the other constitutional violations as previously raised. On February 6, 2006, the Florida Supreme Court denied the Petitioner's motion for rehearing and clarification without explanation.

REASONS FOR GRANTING PETITION

I. Minimum Procedures Required In Bar Disciplinary Proceedings To Meet Standards Of Fairness Guaranteed By The Fourteenth Amendment

This case presents in purest form the issues left untreated in the plurality opinion in *Lathrop v. Donahue*, 367 U.S. 820 (1961), such as the separation of power concerns expressed in Justice Harlan's concurring opinion, joined by Justice Frankfurter at 367 U.S. 853-55, 864-65, based upon the Court's holding in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-31, 541-42 (1935). There, this Court struck down as an "unconstitutional delegation of legislative authority" the transfer to trade associations of the legislative authority to adopt codes of fair competition, where the President's delegated discretion to approve or prescribe was "unfettered" due to the absence of determinative statutory standards. The importance of this question has broad application. As of 1994, thirty-three states, including Florida, allowed its unified bar to serve as the lawyer disciplinary agency, effectuated through a transfer of regulatory authority predicated upon generally articulated purposes.[5] Because those articulated purposes are generally uninformed by the observation of this Court in such cases as *In re Ruffalo*, 390 U.S. 544, 550 (1968), or *Spevack v. Klein*, 385 U.S. 511, 515 (1967) that historically and fundamentally, attorney disciplinary proceedings are penal in nature,[6] state bar proceedings tend to devalue procedural and substantive due process safeguards. As evidenced herein by The Florida Bar's total disregard for the established precedents of this Court, no value is placed upon constitutional safeguards in Florida's bar dominated disciplinary system.

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[5] Devlin, 7 Geo. J. Legal Ethics at 933-938.

[6] *Id.*

The disregard for basic standards of due process and for Petitioner's fundamental interests at every stage of the disciplinary process is not difficult to explain. The reason can be traced to the highly elevated vision of the legal profession underlying the court's integration order in 1949,[7] despite being:

> [C]onscious of the charge that the history of professional organizations since the 'Guild' system of the middle ages has been one bent on enlarging the economy and selfish designs of its members. The answer to this charge is that if bar integration is to be nothing more than a spring board to leap for power and pay and perquisites . . . it is unworthy the noble traditions of the profession.

As noted earlier, the court's "answer to this charge" was to place undue reliance on "the law already in effect" describing the "judicial proceeding" applicable to lawyer discipline in 1938, when concurrent jurisdiction still existed.[8]

The passage of time has proven that 1949 "answer" to have been mistaken, since the procedures governing lawyer regulation do not claim to be more than "a quasi-judicial administration proceeding." Perhaps, the dissent of Justice Douglas in *Lathrop*, 367 U.S. at 881-85, was more conscious of Lord Acton's famous maxim,[9] when he observed that:

> The pattern of this legislation is regimentation . . . [that] appears in humble form today . . . a device . . . not compatible with the First Amendment . . . [which] applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority.

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[7] *Petition of Florida State Bar Association*, 40 So. 2d 902, 909 (Fla. 1949).

[8] *Id.* at 907; *Petition of State Bar Association*, 186 So. 280 (Fla. 1938).

[9] "Power tends to corrupt, and absolute power corrupts absolutely."

Here those "patterns of conformity" are being "moulded" by The Florida Bar, through a regulatory system dominated by the powerful lawyer interests around the state which are represented on the Board of Governors, and as this case highlights, are prepared to use any variety of unconstitutional and despotic measure to preserve its "springboard to leap for power and pay perquisites," in plain and certain defiance of the most rudimentary demands of justice. *See In re Murchison*, 349 U.S. 133, 136 (1955); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972).[10]

The post-1972 Florida Supreme Court has collaborated in the institutionalization of The Florida Bar's imperious belief in its own judicial infallibility and insularity by designating it to be "a public agency of the judicial branch of government,"[11] and "one of the three co-equal departments of state government."[12] This delegation of unfettered enforcement powers and rule-making functions to The Florida Bar in combination with the judicial shield, conferred upon this "official arm of the court," has concentrated into this unified professional association of attorneys all powers "appertains to [each] of the other branches." This is a plain violation of the separation of powers, mandated in Article II, Section 3, Florida Constitution. So, as hypothesized by Justice Harlan, this must be the "occasion for judicial enforcement of Art. IV, § 4."[13]

There is also a fundamental anomaly here flowing from the "agency-shop" analogy used in *Keller v. State Bar*

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[10] The use of a forged, fabricated and tainted material before the grievance committee, upon which the false charges of misconduct resulted; the numerous ex parte contracts between Bar counsel and the Referee; the suborning of false testimony from judges and assistant state attorneys, to mention some of the more dramatic examples.

[11] *In re Florida Bar, etc.*, 316 So. 2d 46 (Fla. 1975).

[12] *Lewis v. Florida Bar*, 372 So. 2d 1121, 1122 (Fla. 1979).

[13] "The United States shall guarantee to every state in this union a Republican form of government."

of California, 496 U.S. 1, 12 (1990) to describe the "relationship of the State Bar and its members." Yet, the associational rights of union members are protected by federal law.[14] By contrast, members of the "integrated" Florida Bar have no "right to refrain from any and all [Bar] activities." All admitted attorneys are automatically made members of the organized bar in order to practice law in the State of Florida, whereupon their membership status and coincidental right to practice are made subject to arbitrary and capricious impairment through Bar initiated disciplinary proceedings. Had this system existed in *Lathrop*, then surely Justice Harlan would have found it to be an abridgement of fundamental liberties "guaranteed by the Due Process Clause" of the Fourteenth Amendment.[15]

II. A State's Power To Regulate The Conduct Of An Attorney When Not Engaged In The Practice Of Law

This presents a narrower sub-set of the Fourteenth Amendment issues more individually related to the more general question of a state's power to regulate the conduct of an attorney when not engaged in the practice of law.[16] More particularly put with the reference to the facts below, The Florida Bar and Florida Supreme Court violated Petitioner's rights under the First, Sixth and Fourteenth Amendments, by scrutinizing his pro se motions and filings made in the course of his self-representation of a

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[14] 29 U.S.C. § 157. Right of employees as to organization, etc.

[15] *Poe v. Ullman*, 367 U.S. 497 (1961), dissent by Justice Harlan at 543-44.

[16] The Florida Bar relied on Bar Rule 3-4.3 to justify its jurisdiction to regulate Petitioner's conduct, despite the fact that in earlier decision – *Florida Bar v. Brake*, 767 So. 2d 1163, 1168, fn. 5 (Fla. 2000) – the court found no violation when an attorney is involved in a legal proceeding, while "not employed in a legal capacity", based on the precise wording of Bar Rule 4-8.4(d).

criminal charge, ultimately dismissed, in order to sanction Petitioner for the supposedly objectionable content of his pro se filings that had not been otherwise found sanctionable during the criminal case.

The objectionable statements were selected from passages from authorized motions for disqualification and filings complaining about the indifference of presiding judges to a warantless arrest of Petitioner inside his residence without probable cause, in violation of *Payton v. New York*, 445 U.S. 573 (1980); for proceeding upon a false charge of "No Harm Neglect," in violation of *Lambert v. California*, 355 U.S. 225, 228 (1957); *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973); and for their role in oppressing Petitioner's absolute right to discharge the public defender in reliance on *Faretta v. California*, 422 U.S. 806 (1975) by conditioning the discharge upon Petitioner's involuntary submission to a competency evaluation; and in allowing the Dade County State Attorney's Office to use his immunized testimony in violation of *Kastigar v. United States*, 406 U.S. 1, 9-13 (1990). While the definition of practice of law for purpose of lawyer regulation has not previously been addressed by this Court,[17] the conduct of attorneys acting in pro se capacities with respect to motion practice alone has traditionally been viewed as outside the reach of lawyer regulation in Florida.[18]

The Florida Supreme Court certainly knows what does not constitute the practice of law and the constitutional limits of the court's power to regulate activities

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[17] Alicia L. Downey, *Fools and Their Ethics: The Professional Responsibility of Pro Se Attorneys*, 34 B.C. L. Rev. 529, 551-54 (May 1993).

[18] The definition used by the Florida Supreme Court in *State v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962) is still appropriate: "It is generally understood that the performance of services in representing another before the courts is the practice of law."

related to self-representation. *See Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1190-92 (Fla. 1978). There in reliance upon its prior formulation in *Sperry*, and this Court's decision in *Faretta* that "affirmed the fundamental constitutional right of all persons to represent themselves in court proceedings," the court concluded that the determination of whether a particular act constitutes the practice of law revolves around the court's "primary goal [of] the protection of the public." Here, however, The Florida Bar conceived its goal differently, to effect punishment for a perceived attack on the entire judicial system based upon Petitioner's claims of prosecutorial and judicial misconduct in sworn motions for disqualification.[19] So, The Bar's primary goal is to employ the court's police power to shield the state's judiciary from potential criticism through pre-emptive use of the disciplinary process, in reciprocity for the judicial shield given to The Florida Bar.

The Bar persuaded the referee that the burden of proof could be shifted, pre-trial, to compel Petitioner to "provide a factual basis for statements subject to Rule 4-8.2" in reliance upon the "objective, reasonable basis" test made applicable to criticism of a judge in *Florida Bar v. Ray*, 797 So. 2d 556, 558 (Fla. 2001).[20] The combined effect of shifting the burden of proof onto Petitioner, and of allowing The Bar to enforce the shifted burden, pre-trial, as a discovery motion, operated as an impermissible presumption affecting the burden of proof, forbidden by Rule 301, Federal Rules of Evidence. This procedure also unconstitutionally burdened Petitioner's First Amendment and due process rights, by depriving him of a fair trial that

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[19] The Bar's reliance on Rule 4-8.2(a) without differentiating between the standard of protected criticism applicable to judicial officials from that applicable to "public legal officer" is plainly unconstitutional. *Garrison v. State of Louisiana*, 379 U.S. 64, 77-79 (1964).

[20] Indicative of The Bar's punitive approach to the Petitioner's case, the complaint in *Ray* was for minor misconduct.

"focuses on whether the attorney had a reasonable factual basis for making the statement, considering the nature and the context in which they were made." *United States Dist. Ct. v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993); *In re Yagman*, 55 F.3d 1430, 1437 (9th Cir. 1995). This procedure was also unconstitutional by making Petitioner's reliance upon his Fifth Amendment privilege, and his claim of *Kastigar* immunity "costly." *Spevack v. Klein*, 385 U.S. 511, 516 (1967).[21]

These actions of The Florida Bar in initiating disciplinary proceedings against this Petitioner, based solely upon its interpretation of selected passages from his pro se filings, conflicts with this Court's decision in *Holt v. Virginia*, 381 U.S. 131, 136 (1965). It also conflicts with the Circuit decisions in *United States v. Copper*, 872 F.2d 1, 3-5 (1st Cir. 1989); and *United States v. Brown*, 72 F.3d 25, 28-29 (5th Cir. 1995).

III. Petitioner's Substantive Due Process Claim

The outcome of disciplinary proceedings, herein described, was a public reprimand approved by the Florida Supreme Court, ostensibly based upon the speech related misconduct alleged by The Florida Bar, though without citing a single rule violation that supported the misconduct for which Petitioner was being reprimanded. Even so, the Florida Supreme Court went beyond the disciplinary measures recommended by the referee, by placing the Petitioner on indefinite probation so that The Bar could coerce Petitioner's compliance through threat of contempt and other sanctions. Though not specified as a condition of

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[21] The Florida Supreme Court applied *Spevack* to a real estate broker subject to a license revocation or suspension proceeding, because "other types of administrative proceedings which may result in a deprivation of livelihood . . . [are] also 'penal' in nature in that they tend to degrade the individual's professional standing." *Vining v. Florida Real Estate Comm.*, 281 So. 2d 487, 491 (Fla. 1973).

probation in the court's Disposition Order of October 18, 2005, contrary to the requirement of Bar Rule 3-5.1(c), it soon became evident that The Florida Bar would rely upon the Disposition Order to enforce the disciplinary measure inserted by Bar counsel into the referee's report, ex parte, that subjects Petitioner to a comprehensive mental health evaluation by a treatment program affiliated with The Florida Bar, and with which Bar counsel is personally associated. App. Q. Yet neither an indefinite suspension without the conditions stated in the order, nor a comprehensive mental health evaluation is authorized under Bar Rule 3-5.1(c), or anywhere else.

This Petitioner had properly invoked the original jurisdiction of the Florida Supreme Court, pursuant to Bar Rule 3-7.7(a), and had complied with all procedural requirements within Rule 3-7.7(c). The Disposition Order erroneously refers to orders and procedural rules being violated, as the court's excuse for abandoning its constitutional responsibility to review the referee's report upon Petitioner's varied constitutional, jurisdictional and substantive claims of error, and to adjudicate whether the report is "erroneous, unlawful, or unjustified" in accordance with Rules 3-7.7(c)(5), (6). Petitioner then filed a timely motion for rehearing and clarification, seeking an explanation for court's action, appearing to be nothing more than a pretext for visiting punishment without the due process required by law – in effect, a regulatory bill of attainder, but none was given in the denial order of February 6, 2006.

Among the Declaration of Rights provided under Article I of Florida's constitution is the "Right of privacy – Section 23, guaranteeing every person "the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." Consequently, this was an unlawful state action, under the faintest color of law, if not transparently despotic. The Florida Supreme Court, by its own action, violated Petitioner's penumbral right to privacy, as established by this

Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965). It violated Petitioner's rights under Americans with Disabilities Act, 42 U.S.C. §§ 12112, 12203.

The Florida Supreme Court has subjected this Petitioner to substantive due process infringements in violation of the Fourteenth Amendment, as described in *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997): "As we stated recently in *Flores*, the Fourteenth Amendment 'forbids the government to infringe . . . fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.' 507 U.S., at 302, 113 S.Ct., at 1447" (emphasis in original); and as described in *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998): " . . . the substantive due process guarantee protects against government power arbitrarily and oppressively exercised."

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

MILES J. GOPMAN, ESQ.
Petitioner pro se

June 9, 2006

APPENDIX A

Supreme Court of Florida

TUESDAY, OCTOBER 18, 2005

CASE NO.: SC04-87
Lower Tribunal No.: 2003-71,056(11M)

THE FLORIDA BAR	vs.	MILES JAY GOPMAN
Complainant(s)		Respondent(s)

After considering numerous filings by the parties and, in particular, upon consideration of respondent's violations of the rules governing these review proceedings and violation of this Court's orders, the Court grants The Florida Bar's motion to dismiss the petition for review. Thus, respondent's petition for review and amended petition for review are dismissed. Further, respondent's initial brief filed August 11, 2005, and amended initial brief filed August 24, 2005, are hereby stricken.

Upon the Court's review of the proceedings before the referee, the Court approves the referee's report, as modified herein, and reprimands respondent. In addition, the Court directs that respondent shall appear before the Board of Governors of the Florida Bar, at a time to be set by the Board, for the imposition of a formal reprimand by the Bar.

Further, respondent is placed on probation for one (1) year and indefinitely thereafter until further order of this Court. *See Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989) (it is well established that in reviewing a referee's recommended discipline, ultimately, it is the Court's responsibility to order the appropriate sanction).

In addition to being placed on probation, respondent shall comply with all other terms and conditions recommended by the referee as set forth in the report.

After reviewing the referee's report and the parties' filings, the Court modifies the terms in paragraph IV. D(1). The sentence in that paragraph providing "Should he fail to comply with any of the requirements set forth in this paragraph, as evidenced by FLA, or their designee's notification to The Florida Bar, Respondent will agree to an immediate and indefinite suspension," is stricken and replaced with the provision: "In the event of allegations that Respondent has violated his probation, The Florida Bar shall file a petition in this Court pursuant to Rule Regulating the Florida Bar 3-5.1(c), by which the Respondent may be punished for contempt or further sanctioned."

In light of the Court's approval of the referee's report, all remaining outstanding motions and petitions are denied.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Miles J. Gopman in the amount of $2,420.72, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall [SEAL]
Clerk, Supreme Court

bhp
Served:

HON. MARGARITA ESQUIROZ, JUDGE
JOHN ANTHONY BOGGS
MILES JAY GOPMAN
WILLIAM MULLIGAN
SCOTT BENNETT SAUL

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, Complainant,	Supreme Court Case No. SC04-87
v.	
MILES JAY GOPMAN, Respondent. /	The Florida Bar File No. 2003-71,056(11M)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS: Pursuant to the undersigned being duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-7.6 of the Rules Regulating The Florida Bar, a Final Hearing was held on November 8, 2004. All of the pleadings, transcripts, notices, motions, orders, and exhibits are forwarded with this report and the foregoing constitutes the record of the case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: William Mulligan
444 Brickell Avenue,
Ste. M100
Miami, Florida 33131

For the Respondent: Miles Jay Gopman, *pro se.*
Mr. Gopman failed to attend the Final Hearing.

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED:

A. At the final hearing, conducted on November 8, 2004, this Referee took testimony of witnesses and heard argument of Bar counsel and concludes that:

1. On or about February 22, 2001, Respondent was charged by information with a felony of the third (3rd) degree for Neglect of an Elderly or Disabled Adult No Harm in violation of Florida Statute 825.102(3)(C) in the *State of Florida v. Miles J. Gopman*; Eleventh Judicial Circuit case no. F01003508 (The Florida Bar's Exhibit "5").

2. Throughout the proceedings in the above criminal case, Respondent filed numerous documents that included statements that Respondent knew or should have known were false or that included statements made with reckless disregard as to their truth or falsity concerning the qualifications or integrity of assigned judges, the State Attorney's Office, and the Public Defender's Office.

3. On or about April 9, 2001, Respondent filed a Motion to Disqualify the Honorable Maria Espinosa Dennis as the presiding judge in the aforesaid case (The Florida Bar's Exhibit "2"). Said motion was replete with improper and prejudicial statements impugning the qualifications and integrity of the judge and

other officers of the court. Examples of some of said statements include:

A. "Because Defendant has needed to correct the Court's misapprehensions, Defendant now fears the temperament of the Court is so hostile to Defendant that it will tolerate flagrant prosecutorial misconduct, while visiting extreme prejudice on Defendant through medium of the Public Defender's Office."

B. " . . . Defendant realizes that from the very outset, this court was predisposed to subject Defendant to *a fast* track process that was designed to coerce Defendant into waiving or forfeiting his lawful objections and defenses to this proceeding. In fact, the taint of a rigged process, through a prearranged understanding with the State to deprive Defendant of his basic rights through orchestrated, unnoticed and unlawful acts, is now transparent."

C. "Yet the fundamental prejudice is in the Court's knowing participation in a corrupt charge from the outset, and/or the facilitation of extreme prosecutorial misconduct . . . "

D. "It is now evident that the Court is an active participant in this corruption."

E. "This indicates the latest attempt by the Court and Public Defender's Office to compromise Defendant's professional standing before the Court as an attorney in good standing, and to create a contrived basis for the Court to use to discredit Defendant . . ."

4. At the conclusion of said motion, Respondent included in the Verification, "I . . . do hereby swear and affirm the alleged facts and reasons relied upon above for the disqualification of the Honorable Maria Espinosa Dennis are true and correct to the best of my knowledge and belief; and that I have made this Motion and statements therein in good faith."

5. On or about April 25, 2001, Judge Dennis recused herself from the case (The Florida Bar's Exhibit "1").

6. On or about May 8, 2001, Respondent filed a motion for the disqualification of the Honorable Manuel A. Crespo, with a cover letter, which contained further statements impugning the qualifications and integrity of judges and other officers of the court (The Florida Bar's Composite Exhibit "6").

7. In said cover letter, Respondent stated,

A. ". . . Judge Dennis, whose methods and dictatorial manner created conflicts between myself and the Public Defender's Office that spilled over

into adverse actions by Judge Dennis."

B. ". . . I contend the re-assignment/ transfer of my case to your division was arranged through what appear to be manipulated means, that are unauthorized and contrary to law, and for the reason that the comments by Judge Dennis in her Order of Revisal, dated April 25, 2001, were improper, unwarranted and facially prejudicial, so as to bias her successor against me by her own overt animus, I am compelled to file this motion to protect against the transfer of prejudice from Judge Dennis."

8. In the Motion for Disqualification of the Honorable Manuel A. Crespo, a sampling of Respondent's scandalous statements included:

A. "Therefore, it is not only the practice of the State Attorney to designate unlicenced individuals to perform duties and functions of assistant state attorneys, but to also, as in the case of Samantha Ruiz, to have them sign oaths of office, which if not a criminal act, is clearly a corrupt act. It is no less than a fraud on the public and corruption of law."

B. "This indicates that Judge Dennis was directly implicated in the corrupt prosecutorial conduct by the

State Attorney's Office in bringing the charges contained in the Information."

C. "In fact, this case had been rigged from the outset . . ." ". . . the State Attorney's Office, in collaboration with Judge Dennis, did corruptly prejudice Defendant's vested right to severance and/or dismissal under this fraudulently consolidated and certified Information . . . "

D. Given the corrupt and manipulative acts and procedures herein above described by the State Attorney's Office and Judge Dennis . . . "

E. ". . . Judge Dennis conducted herself in this ease in a dishonest and corrupt manner, to facilitate and camouflage the illegal acts of the State Attorney's Office . . ."

F. "So what is being re-assigned are a series of legal deprivations of a fundamental character that Judge Dennis and the State Attorney's office want to sweep under the judicial cloak of their hand picked successor."

9. On October 17, 2001 and October 24, 2001, Respondent filed letters addressed to Judge Crespo with the Clerk of Court that contained further outrageous accusations and statements vilifying the integrity of the court and the officers of the court (The Florida Bar's

Composite Exhibit "7"). Said letters included such statements as:

A. ". . . the charge is sham, a fraud on the court, and the result of illegal and fraudulent in take, case filing, consolidation, certification and notarization procedures, involving numerous criminal acts by the State Attorney's office . . ."

B. ". . . the Court's very active role in encouraging me to provide an immunized proffer was merely a ruse towards some entrapment plot . . . making this court an active co-conspirator in the State's criminal violation . . ."

10. Respondent filed numerous other pleadings and documents in which he repeatedly made outrageous accusations and statements impugning the integrity of judges and other officers of the court. A sampling of the other filings include:

A. Letter to Miami-Dade County Public Defender, Bennett Brummer dated March 26, 2001, filed in the *State of Florida v. Miles J. Gopman*; Eleventh Judicial Circuit case no. F01003508 on March 27, 2001 (The Florida Bar's Exhibit "8");

B. Letter to Judge Maria Espinosa Dennis dated March 26, 2001, filed in the *State of Florida v. Miles J. Gopman*; Eleventh Judicial Circuit case no. F01003508 on March 27,

2001 (The Florida Bar's Exhibit "3");

C. *Defendant's Supplemental Motion to Disqualify the Honorable Maria Espinosa Dennis*; filed in the *State of Florida v. Miles J. Gopman*; Eleventh Judicial Circuit case no. F01003508 on April 10, 2001 (The Florida Bar's Exhibit "4");

D. *Appellant's Appendix I to Notice of Interlocutory Appeal Containing Those Orders, Processes, Acts, Deprivations, and Derelictions of Judicial Responsibility for which immediate Appellate Review is Sought, as Described in Paragraph (2) of Appellant's Notice of Interlocutory Appeal*; filed with the Third DCA on July 3, 2001 in *Gopman v. State of Florida*; case no. 3D01-1754 (The Florida Bar's Composite Exhibit "10");

E. *Defendant Appellant's Index to Appendix IV*; filed with the Third DCA on July 3, 2001 in *Gopman v. State of Florida*; case no. 3D01-1754 (The Florida Bar's Composite Exhibit "9").

11. **On September 29, 2004 and November 8, 2004, Respondent failed to attend motion hearings and the final hearing, respectively. Respondent was properly noticed for the above and failed to provide a sufficient**

explanation for his failure to attend said hearings.

12. **Furthermore, Respondent served numerous documents in this case where he attacked Bar counsel's credibility. Respondent's behavior in the bar case has been consistent with the underlying case that is the subject of these proceedings.**

III. RECOMMENDATION AS TO GUILT: I recommend that Respondent be found guilty of Rules 3-4.3 (Misconduct and Minor Misconduct), 4-8.2(a) (Impugning Qualifications and Integrity of Judges or Other Officers), and 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice . . .) of the Rules Regulating The Florida. Bar.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

A. In order to make a recommendation for the appropriate discipline in this case, the applicable sections of the Florida Standards for Imposing Lawyer Sanctions ("Florida Standards") have been considered.

1. 6.2 Abuse of the Legal Process

   a. 6.23 Public Reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes

interference or potential interference with a legal proceeding.

2. 9.2 Aggravation

   a. 9.22(c) a pattern of misconduct;

   b. 9.22(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency.

3. 9.3 Mitigation

   a. 9.32(a) absence of a prior disciplinary record;

   b. 9.32(h) physical or mental disability or impairment.

B. Additionally, the following case law was considered:

1. In *The Florida Bar v. Ray*, 797 So.2d 556 (Fla. 2001), the Supreme Court held that the making of statements questioning a judge's veracity, integrity, and fairness at a hearing involving attorney's client, with reckless disregard as to truth or falsity of such statements, warranted a public reprimand.

2. In *The Florida Bar v. Tindall*, 550 So.2d 449 (Fla. 1989), the Supreme Court held that the filing of a formalized and unsubstantiated allegation that a judge made an unfair

disposition of a case and accepted bribes warranted a public reprimand.

3. In *The Florida Bar v. Weinberger*, 397 So.2d 661 (Fla. 1981), the Supreme Court held that the making of public statements denigrating the courts and administration of justice, followed by apologies and offers to take further action to exhibit remorse, warrants a public reprimand.

4. In *The Florida Bar v. Clark*, 528 So.2d 369 (Fla. 1988), the Supreme Court held that an attorney's repeated, frivolous claims on appeal from a traffic violation and failure to follow mandatory rules of procedure and the making of unsubstantiated charges against the judiciary warranted a public reprimand.

C. As noted in *Ray, Tindall, Weinberger*, and *Clark* a public reprimand is considered appropriate discipline for an attorney who makes an unsubstantiated allegation concerning a judge with reckless disregard as to the truth of the allegation. Respondent made numerous such statements involving not only judges, but also prosecutors and public defenders. Furthermore, unlike *Weinberger*, in the case at hand, Respondent has expressed no remorse for making such statements.

D. Upon consideration of all of the above, I recommend that Respondent receive a Public Reprimand with the following special condition:

1. Respondent shall submit to a comprehensive mental health evaluation conducted by a mental health practitioner approved by Florida Lawyers Assistance, Inc. ("FLA"). Respondent shall initiate this evaluation within thirty (30) days of the Supreme Court order. Should FLA determine that the execution of a contract is deemed appropriate the Respondent shall execute said contract within ten (10) days of notification by FLA. Respondent shall be responsible for contacting FLA to determine whether execution of a contract is deemed appropriate. Respondent further agrees to comply with the terms of his contract with FLA and any other conditions they deem appropriate. If Respondent chooses to relocate, it will be the Respondent's responsibility to locate a comparable facility or other treatment or programs agreeable to FLA. Should he fail to comply with any of the requirements set forth in this paragraph, as evidenced by FLA, or their designee's notification to The Florida Bar, Respondent will agree to an immediate and indefinite suspension.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

Age: 54

Date Admitted to Bar: February 2, 1977

Prior Disciplinary Record: None

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED: I find the following costs were reasonably incurred by The Florida Bar.

Administrative Fee Rule 3-7.6(o)(1)(I)	$ 1,250.00
Court Reporter's attendance at hearing held on June 1, 2004	$ 70.00
Court Reporter's attendance at hearing held on June 3, 2004	$ 70.00
Court Reporter's attendance at hearing held on July 14, 2004	$ 70.00
Court Reporter's attendance at hearing held on September 9, 2004	$ 70.00
Court Reporter's attendance at hearing held on September 29, 2004 and Transcript	$ 128.00
Court Reporter's attendance at Final Hearing held on November 8, 2004	$ 280.00
Staff Investigator's costs	$ 81.90
Travel Expenses of Witness, Michael Padula for Final Hearing	$ 400.82
TOTAL	**$2,420.72**

It is recommended that the foregoing costs be assessed against Respondent. It is further recommended that execution issue with interest at a rate of six percent (6%) to accrue on all costs not paid within thirty (30) days of the Supreme Court's final order, unless the time for payment is extended by the Board of Governors of The Florida Bar.

DATED this ___ day of DEC 21, 2004, 2004.

/s/ Margarita Esquiroz
HONORABLE MARGARITA ESQUIROZ
Referee

Copies furnished to:

William Mulligan, Bar Counsel
John Anthony Boggs, Staff Counsel
Miles Jay Gopman, Respondent

APPENDIX C

Supreme Court of Florida

MONDAY, FEBRUARY 6, 2006

CASE NO.: SC04-87
Lower Tribunal No.: 2003-71,056(11M)

THE FLORIDA BAR vs. MILES JAY GOPMAN

Complainant(s) Respondent(s)

Respondent's motion for rehearing is hereby denied. *See* Fla. R. App. P. 9.330.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall [SEAL]
Clerk, Supreme Court

kd
Served:

SCOTT BENNETT SAUL
JOHN ANTHONY BOGGS
WILLIAM MULLIGAN
MILES JAY GOPMAN
HON. MARGARITA ESQUIROZ, JUDGE

APPENDIX D

Supreme Court of Florida

WHEREAS, it officially has been made known to me that it is necessary to appoint a referee for the Court pursuant to rule 3-7.6(a), Rules Regulating The Florida Bar, to preside in a disciplinary action brought by The Florida Bar pursuant to Chapter 3 of the Rules Regulating The Florida Bar in the matter of:

The Florida Bar vs. Miles Jay Gopman,
Supreme Court Case No. SC04-87

NOW, THEREFORE, I, Harry Lee Anstead, under authority vested in me as Chief Justice of the Supreme Court of Florida, do hereby designate the Honorable Joseph P. Farina, Chief Judge of the Eleventh Judicial Circuit Court of Florida, to appoint a referee for the Court in the above matter and, *within fourteen (14) days of this order*, to notify the Clerk of the Florida Supreme Court as to the judge appointed as referee. The referee shall conduct a case management conference, to be held no later than sixty (60) days from the date of appointment, at which the schedule for the proceedings, including the final hearing date, shall be set. The referee shall have the option of holding the required case management conference either in person or telephonically. The referee shall thereafter hear, conduct, try, and determine the matters presented at the final hearing, and submit findings of fact and recommendations to the Supreme Court of Florida as provided in rule 3-7.6(k). Except in cases where the ninety (90) day time limit provided by rule 3-5.2(f) applies, the referee's report shall be filed within 180 days of his or her appointment, unless there are substantial reasons requiring delay.

DONE AND ORDERED at Tallahassee, Florida, on February 2, 2004.

/s/ Harry L. Anstead
CHIEF JUSTICE
SUPREME COURT
OF FLORIDA

ATTEST:

/s/ Thomas D. Hall
THOMAS D. HALL
CLERK, SUPREME COURT

[SEAL]

Enclosed: Complaint and Request for Admissions.

APPENDIX E

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO: Supreme Court Case No. SC04-87
The Florida Bar File No. 2003-71,056(11M)

The Florida Bar,

Complainant,

~~Plaintiff(s),~~

vs.

Miles Jay Gopman

~~Defendant(s).~~

Respondent. /

ORDER
GRANTING/~~DENYING~~
~~PLAINTIFF'S DEFENDANT'S~~

The Florida Bar's Motion to Require Respondent to Provide Factual Basis For Statements Subject to Rule 4-8.2

THIS CAUSE having come on to be heard on The Florida Bar's Motion ~~on Plaintiff's/Defendant's Motion.~~

to require Respondent to provide a factual basis for statements subject to Rule 4-8.2

and the Court having heard argument of counsel, and being otherwise advised in the premises, it is hereupon

ORDERED AND ADJUDGED that said Motion be, and the same is hereby

Granted. Respondent is required to provide a factual basis for the statements be made that are contained within the Complaint of the Florida Bar and the accompanying exhibits that are subject to Rule 4-8.2 within 20 days of this order.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this 14th day of July, 2004

/s/ Margarita Esquiroz
CIRCUIT COURT JUDGE

Copies furnished to: Counsel of Record

APPENDIX F

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. Supreme Court Case No. SC04-87
The Florida Bar File No. 2003-71,056(11M)

The Florida Bar,

Complainant,

~~Plaintiff(s),~~

vs.

Miles Jay Gopman

~~Defendant(s).~~

Respondent. /

ORDER
GRANTING/~~DENYING~~
~~PLAINTIFF'S-DEFENDANT'S~~

The Florida Bar's
Motion to Compel

THIS CAUSE having come on to be heard on The Florida Bar's Motion ~~on Plaintiff's/Defendant's Motion.~~

Motion to Compel

and the Court having heard argument of counsel, and being otherwise advised in the premises, it is hereupon

ORDERED AND ADJUDGED that said Motion be, and the same is hereby

Granted. Respondent shall comply with *~~providing respondent~~* this Court's Order Granting the Florida Bar's Motion to require Respondent to provide a factual basis for statements subject to Rule 4-8.2 and shall provide his response within 10 days of this order.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this 29th day of September, 2004.

/s/ Margarita Esquiroz
CIRCUIT COURT JUDGE

SEP 29 2004

Margarita Esquiroz

Copies furnished to: Counsel of Record

APPENDIX G

IN THE SUPREME COURT OF FLORIDA

The Florida Bar,

Complainant,

vs.

Supreme Court Case No. SC04-87

Miles Jay Gopman,

Respondent. /

WHEREAS, the Chief Justice of the Supreme Court of Florida has designated the undersigned Chief Judge of the Eleventh Judicial Circuit of Florida to appoint a referee for the Court in the above captioned matter,

NOW, THEREFORE, the undersigned Chief Judge of the Eleventh Judicial Circuit of Florida does hereby appoint **The Honorable Margarita Esquiroz**, Circuit Judge, to serve as a referee pursuant to Chapter 3 of the Rules Regulating The Florida Bar in the matter of:

The Florida Bar v. Miles Jay Gopman
Supreme Court Case No. SC04-87

ORDERED, at Miami, Dade County, Florida, this 24 day of February, 2004.

/s/ Stuart M. Simons Judge Stuart M. Simons
~~Joseph P. Farina~~
Acting Chief Judge
Eleventh Judicial Circuit
(Signed by Stuart M. Simons,
Acting Chief Judge)

APPENDIX H

Supreme Court of Florida

FRIDAY, MARCH 4, 2005

CASE NO.: SC04-87
Lower Tribunal No.: 2003-71,056(11M)

THE FLORIDA BAR vs. MILES JAY GOPMAN

Complainant(s) Respondent(s)

Respondent's Motion to Amend Petition for Review is hereby granted and the amended petition was filed with this Court on March 3, 2005.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall [SEAL]
Clerk, Supreme Court

bhp
Served:

JOHN ANTHONY BOGGS
WILLIAM MULLIGAN
MILES JAY GOPMAN

APPENDIX I

THE CONSTITUTION OF THE UNITED STATES

Article IV

Section 4. The United States shall guarantee to every state in this union a republican form of government . . .

Article VI

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment I

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be . . . compelled in any criminal case to be a witness against himself . . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

29 U.S.C. § 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of

collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

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42 U.S.C. § 12112. Discrimination

(d) Medical examinations and inquiries

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

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42 U.S.C. § 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government;

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42 U.S.C. § 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed . . . any right granted or protected by this chapter.

FEDERAL RULES OF EVIDENCE

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FLORIDA CONSTITUTION

Article I. Declaration of Rights

Section 18. Administrative penalties.

No administrative agency . . . shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.

Section 21. Access to courts.

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Section 23. Right of privacy.

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. . . .

Article II. General Provisions

Section 3. Branches of government.

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Article IV. Executive

Section 6. Executive departments.

All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor, except:

(a) When provided by law, confirmation by the senate or the approval of three members of the cabinet shall be required for appointment to or removal from any designated statutory office.

(b) Boards authorized to grant and revoke licenses to engage in regulated occupations shall be assigned to appropriate departments and their members appointed for fixed terms, subject to removal only for cause.

Article V. Judiciary

Section 15. Attorneys; admission and discipline.

The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.

Section 20. Schedule to Article V.

(5) Each judicial nominating commission shall be composed of the following:

a. Three members appointed by the Board of Governors of The Florida Bar from among The Florida Bar members who are actively engaged in the practice of law with offices within the territorial jurisdiction of the affected court, district or circuit;

b. Three electors who reside in the territorial jurisdiction of the court or circuit appointed by the governor; and

c. Three electors who reside in the territorial jurisdiction of the court or circuit and who are not members of the bar of Florida, selected and appointed by a majority vote of the other six members of the commission.

Article VII. Finance And Taxation

Section 1. Taxation; appropriations; state expenses; state revenue limitation.

(a) No tax shall be levied except in pursuance of law.

RULES REGULATING THE FLORIDA BAR

I. Rules Relating to Regulatory Authority

Introduction

The Supreme Court of Florida by these rules establishes the authority and responsibilities of The Florida Bar, an official arm of the court.

1-1. Name

The name of the body regulated by these rules shall be THE FLORIDA BAR.

Rule 1-3.1 Composition

The membership of The Florida Bar shall be composed of all persons who are admitted by the Supreme Court of Florida to the practice of law in this state and who maintain their membership pursuant to these rules.

Rule 1-3.3 Official Bar Name and Address

Each member of The Florida Bar shall designate an official bar name, mailing address, and business telephone number. If the address given is not the physical location or street address of the principal place of employment, then such information shall also be given. Each member shall promptly notify the executive director of any changes in any information required by this rule. The official bar name of each member of The Florida Bar shall he used in the course of the member's practice of law. A change in official bar name may be made only upon request to and approval of the Supreme Court of Florida.

Rule 1-4.1 Composition of Board of Governors

The board of governors shall be the governing body of The Florida Bar. It shall have 52 members, 51 of whom shall be voting members, and shall consist of the president and the president-elect of The Florida Bar, president and president-elect (who shall vote only in the absence of the president) of the young lawyers division, representatives elected by and from the members of The Florida Bar in

good standing, and 2 residents of the state of Florida who are not members of The Florida Bar. There shall be at least 1 representative from each judicial circuit and at least 1 representative from among the members in good standing residing outside of the state of Florida, all of whom shall be apportioned among and elected from the judicial circuits and the nonresident membership, on the basis of the number of members in good standing residing in each circuit and outside of the state. The formula for determining the number of representatives apportioned to and elected from each judicial circuit and the nonresident membership, and all other matters concerning election and term of office for members of the board of governors, shall be prescribed in chapter 2.

Rule 1-4.2 Authority; Supervision

(a) Authority and Responsibility. The board of governors shall have the authority and responsibility to govern and administer The Florida Bar and to take such action as it may consider necessary to accomplish the purposes of The Florida Bar, subject always to the direction and supervision of the Supreme Court of Florida.

Rule 1-8.1 Responsibility of Board of Governors

Among its other duties, the board of governors is charged with the responsibility of enforcing the Rules of Discipline and the Rules of Professional Conduct.

Rule 1-10.1 Compliance

All members of The Florida Bar shall comply with the terms and the intent of the Rules of Professional Conduct as established and amended by this court.

Rule 1-12.1. Amendment to Rules; Authority; Notice; Procedures; Comments

(c) Board Review of Proposed Amendments. The board of governors shall review proposed amendments by referral of the proposal to an appropriate committee thereof for substantive review. After substantive review, an appropriate committee of the board shall review the proposal for consistency with these rules and the policies of The Florida Bar. After completion of review, a recommendation concerning the proposal shall be made to the board.

* * *

(h) Action by the Supreme Court of Florida. The court shall review all proposed amendments filed under this rule and such amendments shall not become effective until an order is issued approving them. Final action of the court shall be reported in The Florida Bar News

Rule 1-13.1 Time

(b) Additional Time After Service by Mail. When a person has the right or is required to do some act or take some proceeding within a prescribed period after service of a notice or other paper and the notice or paper is served by mail, 5 days shall be added to the prescribed period.

Bylaw 2-4.3 Duties Of Executive Director

The executive director shall be chosen by the board of governors and . . . shall maintain and be in charge of the offices and shall devote full time to the work of The Florida Bar. The board shall fix the executive director's salary and other benefits and emoluments of office.

Rule 3-2.1 Generally

Wherever used in these rules the following words or terms shall have the meaning herein set forth unless the use thereof shall clearly indicate a different meaning:

(a) Bar Counsel. A member of The Florida Bar representing The Florida Bar in any proceeding under these rules.

* * *

(c) Complainant or Complaining Witness. Any person who has complained of the conduct of any member of The Florida Bar to any officer or agency of The Florida Bar.

* * *

(h) Executive Director. The executive director of The Florida Bar.

* * *

(l) Referee. A judge or retired judge appointed to conduct proceedings as provided under these rules.

* * *

(m) Respondent. A member of The Florida Bar or an attorney subject to these rules who is accused of misconduct or whose conduct is under investigation.

* * *

(p) Designated Reviewer. The designated reviewer is a member of the board of governors responsible for review and other specific duties as assigned by the board of governors with respect to a particular grievance committee or matter.

Rule 3-3.1 Supreme Court of Florida; Disciplinary Agencies

The exclusive jurisdiction of the Supreme Court of Florida over the discipline of persons admitted to the practice of law shall be administered in the following manner subject to the supervision and review of the court. The following entities are hereby designated as agencies of the Supreme Court of Florida for this purpose and with the following responsibilities, jurisdiction, and powers. The board of governors, grievance committees, and referees shall have such jurisdiction and powers as are necessary to conduct the proper and speedy disposition of any investigation or cause, including the power to compel the attendance of witnesses, to take or cause to be taken the deposition of witnesses, and to order the production of books, records, or other documentary evidence. *Each* member of such agencies has power to administer oaths and affirmations to witnesses in any matter within the jurisdiction of the agency.

Rule 3-3.2 Board of Governors of The Florida Bar

(a) Responsibility of Board. The board is assigned the responsibility of maintaining high ethical standards among the members of The Florida Bar. The board shall

supervise and conduct disciplinary proceedings in accordance with the provisions of these rules.

(b) Authority to File a Formal Complaint. No formal complaint shall be filed by The Florida Bar in disciplinary proceedings against a member of the bar unless there shall first be a finding under these rules that probable cause exists to believe that the respondent is guilty of misconduct justifying disciplinary action . . .

II. GRIEVANCE AND DISCIPLINARY PROCEDURES

A. Procedures before Grievance Committee

Rule 3-3.3 Counsel for The Florida Bar

The board may employ staff counsel and bar counsel for The Florida Bar to perform such duties, as may be assigned, under the direction of the executive director. Staff counsel may designate members of The Florida Bar to serve as bar counsel to represent The Florida Bar in disciplinary proceedings.

Rule 3-3.4 Grievance Committees

There shall be such grievance committees as are herein provided, each of which shall have the authority and jurisdiction required to perform the functions hereinafter assigned to it and which shall be constituted and appointed as follows:

(a) Circuit Grievance Committees. There shall be at least 1 grievance committee for each judicial circuit of this state and as many more as shall be found desirable by the board. Such committees shall be designated as judicial circuit grievance committees, and in circuits

having more than 1 committee they shall be identified by alphabetical designation in the order of creation. Such committees shall be continuing bodies notwithstanding changes in membership, and they shall have jurisdiction and the power to proceed in all matters properly before them.

* * *

(c) Membership, Appointment, and Eligibility.

Each grievance committee shall be appointed by the board and shall consist of not fewer than 3 members. At least one-third of the committee members shall be nonlawyers. All appointees shall be of legal age and, except for special grievance committees, shall be residents of the circuit or have their principal office in the circuit. The lawyer members of the committee shall have been members of The Florida Bar for at least 5 years.

No member of a grievance committee shall perform any grievance committee function when that member:

(1) is related by blood or marriage to the complainant or respondent;

(2) has a financial, business, property, or personal interest in the matter under consideration or with the complainant or respondent;

(3) has a personal interest that could be affected by the outcome of the proceedings or that could affect the outcome; or

(4) is prejudiced or biased toward either the complainant or the respondent.

Upon notice of the above prohibitions the affected members should recuse themselves from further proceedings. The

grievance committee chair shall have the power to disqualify any member from any proceeding in which any of the above prohibitions exist and are stated of record or in writing in the file by the chair.

(d) Terms. The terms of the members shall be for 1 year from the date of administration of the oath of service on the grievance committee or until such time as their successors are appointed and qualified. Continuous service of a member shall not exceed 3 years. A member shall not be reappointed for a period of 3 years after the end of the member's term; provided, however, the expiration of the term of any member shall not disqualify such member from concluding any investigation or participating in disposition of cases that were pending before the committee when the member's term expired. A member who continues to serve on the grievance committee under the authority of this subdivision shall not be counted as a member of the committee when calculating the minimum number of public members required by this rule.

(e) Officers. There shall be a chair and vice-chair designated by the designated reviewer of that committee. The chair and vice-chair shall be members of The Florida Bar.

* * *

(g) Removal. Any member may be removed from office by the designated reviewer of that committee or the board.

Rule 3-7.3 Review of Inquiries, Complaint Processing, and Initial Investigatory Procedures

(a) Screening of Inquiries. Prior to opening a disciplinary file, bar counsel shall review the inquiry made and determine whether the alleged conduct, if proven, would constitute a violation of the Rules Regulating The Florida Bar warranting the imposition of discipline . . .

(b) Complaint Processing and Bar Counsel Investigation. If bar counsel decides to pursue an inquiry, a disciplinary file shall be opened and the inquiry shall be considered as a complaint, if the form requirement of subdivision (c) is met. Bar counsel shall investigate the allegations contained in the complaint.

* * *

(d) Dismissal of Disciplinary Cases. Bar counsel may dismiss disciplinary cases if, after complete investigation, bar counsel determines that the facts show that the respondent did not violate the Rules Regulating The Florida Bar. . . .

(e) Diversion to Practice and Professionalism Enhancement Programs. Bar counsel may recommend diversion of disciplinary cases as provided elsewhere in these rules if, after complete investigation, bar counsel determines that the facts show that the respondent's conduct did not constitute disciplinary violations more severe than minor misconduct

(f) Referral to Grievance Committees.

Bar counsel may refer disciplinary cases to a grievance committee for its further investigation or action as authorized

elsewhere in these rules. Bar counsel may recommend specific action on a case referred to a grievance committee.

Rule 3-7.4 Grievance Committee Procedures

(c) Investigation. A grievance committee is required to consider all charges of misconduct forwarded to the committee by bar counsel whether based upon a written complaint or not.

* * *

(g) Quorum, Panels, and Vote.

(1) *Quorum.* Three members of the committee, 2 of whom must be lawyers, shall constitute a quorum.

(2) *Panels.* The grievance committee may be divided into panels of not fewer than 3 members, 2 of whom must be lawyers. Division of the grievance committee into panels shall only be upon concurrence of the designated reviewer and the chair of the grievance committee. The 3-member panel shall elect 1 of its lawyer members to preside over the panel's actions. If the chair or vice-chair is a member of a 3-member panel, the chair or vice-chair shall be the presiding officer.

(3) *Vote.* All findings of probable cause and recommendations of guilt of minor misconduct shall be made by affirmative vote of a majority of the committee members present, which majority must number at least 2 members. There shall be no required minimum number of lawyer members voting in order to satisfy the requirements of this rule. The number of committee members voting for or against the committee report shall be recorded. Minority reports may be filed. A lawyer grievance committee member may not vote on the disposition of any matter in which that

member served as the investigating member of the committee.

(h) Rights and Responsibilities of the Respondent. The respondent may be required to testify and to produce evidence as any other witness unless the respondent claims a privilege or right properly available to the respondent under applicable federal or state law. The respondent may be accompanied by counsel. At a reasonable time before any finding of probable cause or minor misconduct is made, the respondent shall be advised of the conduct that is being investigated and the rules that may have been violated. The respondent shall be provided with all materials considered by the committee and shall be given an opportunity to make a written statement, sworn or unsworn, explaining, refuting, or admitting the alleged misconduct.

* * *

(l) Preparation, Forwarding, and Review of Grievance Committee Complaints. If a grievance committee finds probable cause, the bar counsel assigned to the committee shall promptly prepare a record of its investigation and a formal complaint. The record before the committee shall consist of all reports, correspondence, papers, and/or recordings furnished to or received from the respondent, and the transcript of grievance committee meetings or hearings, if the proceedings were attended by a court reporter; provided, however, that the committee may retire into private session to debate the issues involved and to reach a decision as to the action to be taken. The formal complaint shall be approved by the member of the committee who presided in the proceeding. The formal complaint shall be in such form as shall be prescribed by the board. If the presiding member of the grievance

committee disagrees with the form of the complaint, the presiding member may direct bar counsel to make changes accordingly. If bar counsel does not agree with the changes, the matter shall be referred to the designated reviewer of the committee for appropriate action. When a formal complaint by a grievance committee is not referred to the designated reviewer, or returned to the grievance committee for further action, the formal complaint shall be promptly forwarded to and reviewed by staff counsel who shall file the formal complaint, and furnish a copy of the formal complaint to the respondent. A copy of the record shall be made available to the respondent at the respondent's expense.

* * *

(m) Recommendation of Admonishment for Minor Misconduct. If the committee recommends an admonishment for minor misconduct, the grievance committee report shall be drafted by bar counsel and signed by the presiding member.

* * *

(o) Recommendation of Diversion to Remedial Programs. A grievance committee may recommend, as an alternative to issuing a finding of minor misconduct or no probable cause with a letter of advice, diversion of the disciplinary case to a practice and professionalism enhancement program as provided elsewhere in these rules.

(p) Preparation, Review, and Filing of Complaint. [S]taff counsel shall sign the complaint and file the same in the Supreme Court of Florida, serve a copy on the respondent, and request the Supreme Court of Florida to assign a referee to try the cause.

B. Procedures before A Referee

Rule 3-7.6 Procedures Before A Referee

(a) Referees. The chief justice shall have the power to appoint referees to try disciplinary cases and to delegate to a chief judge of a judicial circuit the power to appoint referees for duty in the chief judge's circuit. Such appointees shall ordinarily be active county or circuit judges, but the chief justice may appoint retired judges.

(b) Trial by Referee. When a finding has been made by a grievance committee or by the board that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action, and the formal complaint based on such finding of probable cause has been assigned by the chief justice for trial before a referee, the proceeding thereafter shall be an adversary proceeding that shall be conducted as hereinafter set forth.

(c) Pretrial Conference. Within 60 days of the order assigning the case to the referee, the referee shall conduct a pretrial conference. The purpose of the conference is to set a schedule for the proceedings, including discovery deadlines and a final hearing date. The referee shall enter a written order in the proceedings reflecting the schedule determined at the conference.

(d) Venue. The trial shall be held in the county in which an alleged offense occurred or in the county where the respondent resides or practices law or last practiced law in Florida, whichever shall be designated by the Supreme Court of Florida; provided, however, that if the respondent is not a resident of Florida and if the alleged offense is not committed in Florida, the trial shall be held in a county designated by the chief justice.

(e) Style of Proceedings. All proceedings instituted by The Florida Bar shall be styled "The Florida Bar, Complainant, v. (name of respondent), Respondent," and "In The Supreme Court of Florida (Before a Referee)."

(f) Nature of Proceedings.

(1) *Administrative in Character.* A disciplinary proceeding is neither civil nor criminal but is a quasi-judicial administrative proceeding. The Florida Rules of Civil Procedure apply except as otherwise provided in this rule.

(2) *Discovery.* Discovery shall be available to the parties in accordance with the Florida Rules of Civil Procedure.

(g) Bar Counsel. Bar counsel shall make such investigation as is necessary and shall prepare and prosecute with utmost diligence any case assigned.

(h) Pleadings. Pleadings may be informal and shall comply with the following requirements:

* * *

(5) *Filing and Service of Pleadings.*

(A) Prior to Appointment of Referee. Any pleadings filed in a case prior to appointment of a referee shall be filed with the Supreme Court of Florida and shall bear a certificate of service showing parties upon whom service of copies has been made. On appointment of referee, the Supreme Court of Florida shall notify the parties of such appointment and forward all pleadings filed with the court to the referee for action.

(B) After Appointment of Referee. All pleadings, motions, notices, and orders filed after appointment of a referee shall be filed with the referee and

shall bear a certificate of service showing service of a copy on staff counsel and bar counsel of The Florida Bar and on all interested parties to the proceedings.

* * *

(8) *Disqualification of Referee.* Upon motion of either party, a referee may be disqualified from service in the same manner and to the same extent that a trial judge may be disqualified under existing law from acting in a judicial capacity. In the event of disqualification, the chief justice shall appoint a successor.

(i) Notice of Final Hearing. The cause may be set down for trial by either party or the referee upon not less than 10 days' notice. The trial shall be held as soon as possible following the expiration of 10 days from the filing of the respondent's answer, or if no answer is filed, then from the date when such answer is due.

(j) The Respondent. Unless the respondent claims a privilege or right properly available under applicable federal or state law, the respondent may be called as a witness by The Florida Bar to make specific and complete disclosure of all matters material to the issues.

* * *

(m) Referee's Report.

(1) *Contents of Report.* Within 30 days after the conclusion of a trial before a referee or 10 days after the referee receives the transcripts of all hearings, whichever is later . . . the referee shall make a report and enter it as part of the record . . . The referee's report shall include:

(A) a finding of fact as to each item of misconduct of which the respondent is charged,

which findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding;

(B) recommendations as to whether the respondent should be found guilty of misconduct justifying disciplinary measures;

(C) recommendations as to the disciplinary measures to be applied;

(D) a statement of any past disciplinary measures as to the respondent that are on record with the executive director of The Florida Bar or that otherwise become known to the referee through evidence properly admitted by the referee during the course of the proceedings (after a finding of guilt, all evidence of prior disciplinary measures may be offered by bar counsel subject to appropriate objection or explanation by respondent); and

(E) a statement of costs incurred and recommendations as to the manner in which such costs should be taxed.

(2) *Filing.* The referee's report and record of proceedings shall in all cases be transmitted together to the Supreme Court of Florida. Copies of the report shall be served on the parties including staff counsel. Bar counsel will make a copy of the record, as furnished, available to other parties on request and payment of the actual costs of reproduction.

* * *

(q) Costs.

(1) *Taxable Costs.* Taxable costs of the proceedings shall include only:

(A) investigative costs, including travel and out-of-pocket expenses;

(B) court reporters' fees;

(C) copy costs;

(D) telephone charges;

(E) fees for translation services;

(F) witness expenses, including travel and out-of-pocket expenses;

(G) travel and out-of-pocket expenses of the referee;

(H) travel and out-of-pocket expenses of counsel in the proceedings, including of the respondent if acting as counsel; and

(I) an administrative fee in the amount of $1250 when costs are assessed in favor of the bar.

* * *

(3) *Assessment of Bar Costs.* When the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated.

C. Procedure Before Supreme Court Of Florida

Rule 3-7.7 Procedures Before Supreme Court Of Florida

All reports of a referee and all judgments entered in proceedings under these rules shall be subject to review by the Supreme Court of Florida in the following manner:

(a) Right of Review.

(1) Any party to a proceeding may procure review of a report of a referee or a judgment, or any specified portion thereof, entered under these rules.

(2) The Supreme Court of Florida shall review all reports and judgments of referees recommending probation, public reprimand, suspension, disbarment, or resignation pending disciplinary proceedings.

* * *

(c) Procedure for Review. Review by the Supreme Court of Florida shall be in accordance with the following procedures:

(1) *Time for Review.* Proceedings for review shall be commenced within 60 days of the date on which the referee serves a copy of the referee report on the respondent and The Florida Bar. Prompt written notice of the board's action, if any, shall be communicated to the respondent. The proceeding shall be commenced by filing with the Supreme Court of Florida a petition for review, specifying those portions of the report of a referee sought to be reviewed. Within 20 days after service of such petition, the opposing party may file a cross-petition for review specifying any additional portion of the report that said party desires reviewed. The filing of such petition or cross-petition shall be jurisdictional as to a review to be procured as a matter of right, but the court may, in its discretion, consider a late-filed petition or cross-petition upon a showing of good cause.

(2) *Record on Review.* The report and record filed by the referee shall constitute the record on review. If hearings were held at which testimony was heard, but no transcripts thereof were filed in the matter, the party seeking review shall order preparation

of all such transcripts, file the original thereof with the court, and serve copies on the opposing party, on or before the time of filing of the initial brief, as provided elsewhere in this rule. The party seeking review shall be responsible for, and pay directly to the court reporter, the cost of preparation of transcripts. Failure to timely file and serve all of such transcripts may be cause for dismissal of the party's petition for review.

* * *

(5) *Burden.* Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified.

(6) *Judgment of Supreme Court of Florida.* After review, the Supreme Court of Florida shall enter an appropriate order or judgment. If no review is sought of a report of a referee entered under the rules and filed in the court, the findings of fact shall be deemed conclusive and the disciplinary measure recommended by the referee shall be the disciplinary measure imposed by the court, unless the court directs the parties to submit briefs or oral argument directed to the suitability of the disciplinary measure recommended by the referee. A referee's report that becomes final when no review has been timely filed shall be reported in an order of the Supreme Court of Florida.

III. RULES OF MISCONDUCT AND DISCIPLINARY SANCTIONS

3-4.1 Notice and Knowledge of Rules; Jurisdiction over Attorneys of Other States and Foreign Countries

Every member of The Florida Bar and every attorney of another state or foreign country who provides or offers

to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of this court and its agencies under this rule and is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court. Jurisdiction over an attorney of another state who is not a member of The Florida Bar shall be limited to conduct as an attorney in relation to the business for which the attorney was permitted to practice in this state and the privilege in the future to practice law in the state of Florida.

Rule 3-4.3 Misconduct and Minor Misconduct

The standards of professional conduct to be observed by members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof. The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.

Rule 3-4.4 Criminal Misconduct

Unless modified or stayed by the Supreme Court of Florida as provided elsewhere herein, a determination or judgment of guilt of a member of The Florida Bar by a

court of competent jurisdiction of any crime or offense that is a felony under the laws of such jurisdiction is cause for automatic suspension from the practice of law in Florida. In addition, whether the alleged misconduct constitutes a felony or misdemeanor The Florida Bar may initiate disciplinary action regardless of whether the respondent has been tried, acquitted, or convicted in a court for the alleged criminal offense; however, the board may, in its discretion, withhold prosecution of disciplinary proceedings pending the outcome of criminal proceedings against the respondent. The acquittal of the respondent in a criminal proceeding shall not necessarily be a bar to disciplinary proceedings nor shall the findings, judgment, or decree of any court in civil proceedings necessarily be binding in disciplinary proceedings.

Rule 3-5.1 Generally

A judgment entered, finding a member of The Florida Bar guilty of misconduct, shall include one or more of the following disciplinary measures:

(a) Admonishments. A Supreme Court of Florida order finding minor misconduct and adjudging an admonishment may direct the respondent to appear before the Supreme Court of Florida, the board of governors, grievance committee, or the referee for administration of the admonishment. A grievance committee report and finding of minor misconduct or the board of governors, upon review of such report, may direct the respondent to appear before the board of governors or the grievance committee for administration of the admonishment. A memorandum of administration of an admonishment shall thereafter be made a part of the record of the proceeding.

(b) Minor Misconduct. Minor misconduct is the only type of misconduct for which an admonishment is an appropriate disciplinary sanction.

(1) *Criteria.* In the absence of unusual circumstances misconduct shall not be regarded as minor if any of the following conditions exist:

(A) the misconduct involves misappropriation of a client's funds or property;

(B) the misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights, or valuable property rights) to a client or other person;

(C) the respondent has been publicly disciplined in the past 3 years;

(D) the misconduct involved is of the same nature as misconduct for which the respondent has been disciplined in the past 5 years;

(E) the misconduct includes dishonesty, misrepresentation, deceit, or fraud on the part of the respondent; or

(F) the misconduct constitutes the commission of a felony under applicable law.

(2) *Discretion of Grievance Committee.* Despite the presence of 1 or more of the criteria described in subdivision (1) above, a grievance committee may recommend an admonishment for minor misconduct or diversion to a practice and professionalism enhancement program when unusual circumstances are present. When the grievance committee recommends an admonishment for minor misconduct or diversion to a practice and professionalism enhancement program under such circumstances, its report shall contain a

detailed explanation of the circumstances giving rise to the committee's recommendation.

(3) *Recommendation of Minor Misconduct.* If a grievance committee finds the respondent guilty of minor misconduct or if the respondent shall admit guilt of minor misconduct and the committee concurs, the grievance committee shall file its report recommending an admonishment, recommending the manner of administration, and for the taxing of costs against the respondent. The report recommending an admonishment shall be forwarded to staff counsel and the designated reviewer for review. If staff counsel does not return the report to the grievance committee to remedy a defect therein, or if the report is not referred to the disciplinary review committee by the designated reviewer (as provided in rule 3-7.5(b)), the report shall then be served on the respondent by bar counsel. The report and finding of minor misconduct shall become final unless rejected by the respondent within 15 days after service of the report. If rejected by the respondent, the report shall be referred to bar counsel and referee for trial on complaint of minor misconduct to be prepared by bar counsel as in the case of a finding of probable cause. If the report of minor misconduct is not rejected by the respondent, notice of the finding of minor misconduct shall be given, in writing, to the complainant.

c) **Probation.** The respondent may be placed on probation for a stated period of time of not less than 6 months nor more than 3 years or for an indefinite period determined by conditions stated in the order. The judgment shall state the conditions of the probation, which may include but are not limited to the following:

(1) completion of a practice and professionalism enhancement program as provided elsewhere in these rules;

(2) supervision of all or part of the respondent's work by a member of The Florida Bar;

(3) the making of reports to a designated agency;

(4) the satisfactory completion of a course of study or a paper on legal ethics approved by the Supreme Court of Florida;

(5) such supervision over fees and trust accounts as the court may direct; or

(6) restrictions on the ability to advertise legal services, either in type of advertisement or a general prohibition for a stated period of time, in cases in which rules regulating advertising have been violated or the legal representation in which the misconduct occurred was obtained by advertising. The respondent will reimburse the bar for the costs of supervision. Upon failure of a respondent to comply with the conditions of the probation or a finding of probable cause as to conduct of the respondent committed during the period of probation, the respondent may be punished for contempt on petition by The Florida Bar, as provided elsewhere in these Rules Regulating The Florida Bar. An order of the court imposing sanctions for contempt under this rule may also terminate the probation previously imposed.

(d) Public Reprimand. A public reprimand shall be administered in the manner prescribed in the judgment but all such reprimands shall be reported in the Southern Reporter. Due notice shall be given to the respondent of any proceeding set to administer the reprimand. The

respondent shall appear personally before the Supreme Court of Florida, the board of governors, any judge designated to administer the reprimand, or the referee, if required, and such appearance shall be made a part of the record of the proceeding.

Rule 3-5.3 Diversion of Disciplinary Cases to Practice and Professionalism Enhancement Programs

(b) Types of Disciplinary Cases Eligible for Diversion. Disciplinary cases that otherwise would be disposed of by a finding of minor misconduct or by a finding of no probable cause with a letter of advice are eligible for diversion to practice and professionalism enhancement programs.

* * *

(d) Approval of Diversion of Cases at Staff or Grievance Committee Level Investigations. The bar shall not offer a respondent the opportunity to divert a disciplinary case that is pending at staff or grievance committee level investigations to a practice and professionalism enhancement program unless staff counsel, the grievance committee chair, and the designated reviewer concur.

* * *

(h) Diversion at Trial Level.

(1) *Agreement of the Parties.* A referee may recommend diversion of a disciplinary case to a practice and professionalism enhancement program if the bar approves diversion and the respondent agrees. The procedures for approval of conditional pleas provided

elsewhere in these rules shall apply to diversion at the trial level.

(2) *After Submission of Evidence.* A referee may recommend diversion of a disciplinary case to a practice and professionalism enhancement program if, after submission of evidence, but before a finding of guilt, the referee determines that, if proven, the conduct alleged to have been committed by the respondent is not more serious than minor misconduct.

Rule 3-7.1 Confidentiality

(j) Chemical Dependency and Psychological Treatment. That an attorney has voluntarily sought, received, or accepted treatment for chemical dependency or psychological problems shall be confidential and shall not be admitted as evidence in disciplinary proceedings under these rules unless agreed to by the attorney who sought the treatment.

For purposes of this subdivision, an attorney shall be deemed to have voluntarily sought, received, or accepted treatment for chemical dependency or psychological problems if the attorney was not under compulsion of law or rule to do so, or if the treatment is not a part of conditional admission to The Florida Bar or of a disciplinary sanction imposed under these rules.

It is the purpose of this subdivision to encourage attorneys to voluntarily seek advice, counsel, and treatment available to attorneys, without fear that the fact it is sought or rendered will or might cause embarrassment in any future disciplinary matter

Rule 3-7.13 Incapacity Not Related To Misconduct

(a) Proceedings Without Adjudication of Incompetence or Hospitalization Under the Florida Mental Health Act. Whenever an attorney who has not been adjudged incompetent is incapable of practicing law because of physical or mental illness, incapacity, or other infirmity, the attorney may be classified as an inactive member and shall refrain from the practice of law for such reason even though no misconduct is alleged or proved. Proceedings under this rule shall be processed under the Rules of Discipline in the same manner as proceedings involving acts of misconduct.

A member who has been classified as inactive under this rule may be reinstated in the same manner as in proceedings for reinstatement after suspension for acts of misconduct.

Rule 4-3.3 Candor Toward The Tribunal

(a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

Rule 4-3.5 Impartiality And Decorum Of The Tribunal

(c) Disruption of Tribunal. A lawyer shall not engage in conduct intended to disrupt a tribunal.

Rule 4-8.2 Judicial And Legal Officials

(a) Impugning Qualifications and Integrity of Judges or Other Officers. A lawyer shall not make a

statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.

Rule 4-8.4 Misconduct

A lawyer shall not:

* * *

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability,

marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;

Comment

. . . Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. . .

CODE OF JUDICIAL CONDUCT FOR THE STATE OF FLORIDA

Canon 3

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

* * *

B. Adjudicative Responsibilities.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing . . .

* * *

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

* * *

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

FLORIDA RULES OF CIVIL PROCEDURE

Rule 1.380. Failure to Make Discovery; Sanctions

(a) Motion for Order Compelling Discovery. Upon reasonable notice to other parties and all persons affected, a party may apply for an order compelling discovery as follows:

* * *

(2) Motion. If a deponent fails to answer a question propounded or submitted under rule 1.310 or 1.320 [deposition] . . . or a party fails to answer an interrogatory submitted under rule 1.340 . . . the discovering party may move for an order compelling an answer . . .

* * *

(b) Failure to Comply with Order.

(2) (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

(C) An order striking out pleadings or parts of them . . . or rendering a judgment by default against the disobedient party.

(D) Instead of any of the foregoing orders or in addition to them, an order treating as a contempt of court the failure to obey any orders . . .

Rule 1.440. Selling Action for Trial

(c) Setting for Trial. If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. Trial shall be set not less than 30 days from the service of the notice for trial. By giving the same notice the court may set an action for trial. In actions in which the damages are not liquidated, the order setting an action for trial shall be served on parties who are in default in accordance with rule 1.080(a).

FLORIDA RULES OF JUDICIAL ADMINISTRATION

Rule 2.160. Disqualification of Trial Judges

(a) Application. This rule applies only to county and circuit judges in all matters in all divisions of court.

(b) Parties. Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.

* * *

(d) Grounds. A motion to disqualify shall show:

(1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge . . .

* * *

(f) Determination – Initial Motion. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.111. Providing Counsel to Indigents

(a) When Counsel Provided. A person entitled to appointment of counsel as provided herein shall have counsel appointed when the person is formally charged with an offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing judge, whichever occurs earliest.

* * *

(d) Waiver of Counsel.

* * *

(3) Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel.

* * *

(5) If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

Rule 3.115. Duties of State Attorney; Criminal Intake

The state attorney shall provide the personnel or procedure for criminal intake in the judicial system. All sworn complaints charging the commission of a criminal offense shall be filed in the office of the clerk of the circuit court and delivered to the state attorney for further proceedings.

Rule 3.140. Indictments; Informations

(d) The Charge.

(1) Allegation of Facts; Citation of Law Violated. Each count of an indictment or information on which the defendant is to be tried shall allege the essential facts constituting the offense charged. In addition, each count shall recite the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. Error in or omission of the citation shall not be ground for dismissing the count or for a reversal of a conviction based thereon if the error or omission did not mislead the defendant to the defendant's prejudice.

* * *

(g) Signature, Oath, and Certification; Information. An information charging the commission of a felony shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his or her good faith in instituting the prosecution and certifying that he or she has received testimony under oath from the material witness or witnesses for the offense. . . .

* * *

(m) Defendant's Right to Copy of Indictment or Information. Each person who has been indicted or informed against for an offense shall, on application to the clerk, be furnished a copy of the indictment or information and the endorsements thereon, at least 24 hours before being required to plead to the indictment or information if a copy has not been so furnished. A failure to furnish a copy shall not affect the validity of any subsequent proceeding against the defendant if he or she pleads to the indictment or information.

Rule 3.191. Speedy Trial

(a) Speedy Trial without Demand . . . every person charged with a crime shall be brought to trial within . . . 175 days of arrest if the crime charged is a felony. If trial is not commenced within these time periods, the defendant shall be entitled to the appropriate remedy as set forth in subdivision (p). The time periods established by this subdivision shall commence when the person is taken into custody as defined under subdivision (d). A person charged with a crime is entitled to the benefits of this rule whether the person is in custody in a jail or correctional institution of this state or a political subdivision thereof or is at liberty on bail or recognizance or other

pretrial release condition. This subdivision shall cease to apply whenever a person files a valid demand for speedy trial under subdivision (b).

* * *

(p) Remedy for Failure to Try Defendant within the Specified Time.

(2) At any time after the expiration of the prescribed time period, the defendant may file a separate pleading entitled "Notice of Expiration of Speedy Trial Time," and serve a copy on the prosecuting authority.

(3) No later than 5 days from the date of the filing of a notice of expiration of speedy trial time, the court shall hold a hearing on the notice and . . . shall order that the defendant be brought to trial within 10 days. A defendant not brought to trial within the 10-day period through no fault of the defendant, on motion of the defendant or the court, shall be forever discharged from the crime.

FLORIDA RULES OF APPELLATE PROCEDURE

Rule 9.330. Rehearing; Clarification; Certification

(a) Time for Filing; Contents; Response. A motion for rehearing, clarification, or certification may be filed within 15 days of an order or within such other time set by the court. A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding. A motion for clarification shall state with particularity the points of law or fact in the court's decision that, in the opinion of the movant,

are in need of clarification. A response may be served within 10 days of service of the motion. When a decision is entered without opinion, and a party believes that a written opinion would provide a legitimate basis for supreme court review, the motion may include a request that the court issue a written opinion.

FLORIDA STATUTES

Judges: General Provisions

38.10 Disqualification of judge for prejudice; application; affidavits; etc.

Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified.

Evidence Code

90.301 Presumption defined; inferences.

(1) For the purposes of this chapter, a presumption is an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established.

(2) Except for presumptions that are conclusive under the law from which they arise, a presumption is rebuttable.

(3) Nothing in this chapter shall prevent the drawing of an inference that is appropriate.

(4) Sections 90.301-90.304 are applicable only in civil actions or proceedings.

90.302 Classification of rebuttable presumptions. – Every rebuttable presumption is either:

(1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or

(2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact.

90.303 Presumption affecting the burden of producing evidence defined. – In a civil action or proceeding, unless otherwise provided by statute, a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy, is a presumption affecting the burden of producing evidence.

90.304 Presumption affecting the burden of proof defined. – In civil actions, all rebuttable presumptions

which are not defined in s. 90.303 are presumptions affecting the burden of proof.

Administrative Procedure Act

120.50 Exception to application of chapter. – This chapter shall not apply to:

(1) The Legislature.

(2) The courts.

120.51 Short title. – This chapter may be known and cited as the "Administrative Procedure Act."

120.52 Definitions. – As used in this act:

(1) "Agency" means:

(a) The Governor in the exercise of all executive powers other than those derived from the constitution.

(b) Each:

1. State officer and state department, and each departmental unit . . .

* * *

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or . . .

120.56 Challenges to rules. –

(1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE. –

(a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

120.57 Additional procedures for particular cases. –

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT. –

(a) Excerpt as provided in ss. 120.80 and 120.81, an administrative law judge assigned by the division shall conduct all hearings under this subsection . . .

(b) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed

findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. . . .

Nursing Homes and Related Health Care Facilities

400.428 Resident bill of rights.

(7) Any person who submits or reports a complaint concerning a suspected violation of the provisions of this part or concerning services and conditions in facilities, or who testifies in any administrative or judicial proceeding arising from such a complaint, shall have immunity from any civil or criminal liability therefor, unless such person has acted in bad faith or with malicious purpose or the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.

825.102 Abuse, aggravated abuse, and neglect of an elderly person or disabled adult; penalties.

(3)(a) "Neglect of an elderly person or disabled adult" means:

1. A caregiver's failure or omission to provide an elderly person or disabled adult with the care, supervision, and services necessary to maintain the elderly person's or disabled adult's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the elderly person or disabled adult; or

2. A caregiver's failure to make a reasonable effort to protect an elderly person or disabled adult

from abuse, neglect, or exploitation by another person.

Neglect of an elderly person or disabled adult may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or psychological injury, or a substantial risk of death, to an elderly person or disabled adult.

(b) A person who willfully or by culpable negligence neglects an elderly person or disabled adult and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) A person who willfully or by culpable negligence neglects an elderly person or disabled adult without causing great bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

825.105 Good faith assistance. – This chapter is not intended to impose criminal liability on a person who makes a good faith effort to assist an elderly person or disabled adult in the management of the funds, assets, or property of the elderly person or disabled adult, which effort fails through no fault of the person.

APPENDIX J

[LOGO]

THE FLORIDA BAR
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444 BRICKELL AVENUE
MIAMI, FL 33131-2404

JOHN F. HARKNESS, JR.
Executive Director

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MEMORANDUM

TO: ***Members of Grievance Committee (11M)***

FROM: ***WILLIAM MULLIGAN, Bar Counsel***
[/s/ WM]

CC: ***Jennifer R. Coberly, Designated Reviewer (w/enclosures)***

DATE: ***February 25, 2003***

RE: ***PAPER HEARING***
Complaint of the Florida Bar against Miles Jay Gopman
The Florida Bar File No. 2003-71,056(11M)

* *

A meeting will be held on **March 26, 2003 at 5:00 P.M.** to consider the above-referenced case. Please review the enclosed materials prior to the meeting and bring same with you to the meeting.

This matter will be heard based on those documents only. Live testimony ***will not*** be presented. Should you believe that the presentation of any other documents might assist you in your determination, please contact me immediately.

Additionally, please review the below delineated rule violations that I have charged the respondent with potentially

violating. Should you believe there are other applicable rule violations, please contact me immediately.

Rules: 3-4.3 and 3-4.4 of the Rules of Discipline and 4-8.2(a), 4-8.4(b), and 4-8.4(d) of the Rules of Professional Conduct.

Please also be prepared to report on any files you are investigating

Thank you.

WM\ep
Enclosures

Index of Materials to be Reviewed

1. Selected documents from the State's file in *State of Florida v. Miles Jay Gopman*, case no. 01-3508.
2. Response letter of Miles J. Gopman to The Florida Bar dated February 21, 2003.

APPENDIX K

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR Complainant,	Supreme Court Case No.
vs.	
MILES JAY GOPMAN, Respondent. /	The Florida Bar File No. 2003-71,056(11M)

COMPLAINT OF THE FLORIDA BAR

THE FLORIDA BAR, Complainant, files this Complaint against Miles Jay Gopman, Respondent, pursuant to Chapter 3, Rules Regulating The Florida Bar and alleges the following:

1. Respondent, Miles Jay Gopman, is and was at all times material herein a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. On or about February 22, 2001, Respondent was charged by information with a felony of the third (3rd) degree for Neglect of an Elderly or Disabled Adult No Harm in violation of Florida Statute 825.102(3)(C) in the *State of Florida v. Miles J. Gopman*; Eleventh Judicial Circuit case no. F01003508 (Exhibit "A").

3. Throughout the proceedings in the above criminal case, Respondent filed numerous documents that included statements that Respondent knew or should have known were false or that included statements made with reckless disregard as to their truth or falsity concerning the qualifications

or integrity of assigned judges, the State Attorney's Office, and the Public Defender's Office.

4. On or about April 9, 2001, Respondent filed a Motion to Disqualify the Honorable Maria Espinosa Dennis as the presiding judge in the aforesaid case (Exhibit "B").

5. Said motion was replete with improper and prejudicial statements impugning the qualifications and integrity of the judge and other officers of the court. Examples of some of said statements include:

A. "Because Defendant has needed to correct the court's misapprehensions, Defendant now fears the temperament of the Court is so hostile to Defendant that it will tolerate flagrant prosecutorial misconduct, while visiting extreme prejudice on Defendant through medium of the Public Defender's Office."

B. " . . . Defendant realizes that from the very outset, this court was predisposed to subject Defendant to a fast track process that was designed to coerce Defendant into waiving or forfeiting his lawful objections and defenses to this proceeding. In fact, the taint of a rigged process, through a pre-arranged understanding with the State to deprive Defendant of his basic rights through orchestrated, unnoticed and unlawful acts, is now transparent."

C. "Yet the fundamental prejudice is in the Court's knowing participation in a corrupt charge from the outset, and/or the facilitation of extreme prosecutorial misconduct . . . "

D. "It is now evident that the Court is an active participant in this corruption."

E. "This indicates the latest attempt by the Court and Public Defender's Office to compromise Defendant's professional standing before the Court as an attorney in good standing, and to create a contrived basis for the Court to use to discredit Defendant . . . "

6. At the conclusion of said motion, Respondent included in the Verification, "I . . . do hereby swear and affirm the alleged facts and reasons relied upon above for the disqualification of the Honorable Maria Espinosa Dennis are true and correct to the best of my knowledge and belief, and that I have made this Motion and statements therein in good faith."

7. On or about April 25, 2001, Judge Dennis recused herself from the case.

8. On or about May 8, 2001, Respondent filed a motion for the disqualification of the Honorable Manuel A. Crespo, with a cover letter, which contained further statements impugning the qualifications and integrity of judges and other officers of the court ("Composite Exhibit "C").

9. In said cover letter, Respondent, stated,

A. " . . . Judge Dennis, whose methods and dictatorial manner created conflicts between myself and the Public Defender's Office that spilled over into adverse actions by Judge Dennis."

B. " . . . I contend the re-assignment/transfer of my case to your division was arranged through what appear to be manipulated means, that are unauthorized and contrary to law, and for the reason that the comments by

Judge Dennis in her Order of refusal, dated April 25, 2001, were improper, unwarranted and facially prejudicial, so as to bias her successor against me by her own overt animus, I am compelled to file this motion to protect against the transfer of prejudice from Judge Dennis."

10. In the Motion for Disqualification of the Honorable Manuel A. Crespo, a sampling of Respondent's scandalous statements included:

A. "Therefore, it was not only the practice of the State Attorney to designate unlicensed individuals to perform duties and functions of assistant state attorneys, but to also, as in the case of Samantha Ruiz, to have them sign oaths of office, which if not a criminal act, is clearly a corrupt act. It is no less than a fraud on the public and corruption of law."

B. "this indicates that Judge Dennis was directly implicated in the corrupt prosecutorial conduct by the State Attorney's Office in bringing the charges contained in the Information."

C. "In fact, this case had been rigged from the outset . . . "

D. " . . . the State Attorney's Office, in collaboration with Judge Dennis, did corruptly prejudice Defendant's vested right to severance and/or dismissal under this fraudulently consolidated and certified Information . . . "

E. Given the corrupt and manipulative acts and procedures herein above described by

the State Attorney's Office and Judge Dennis . . . "

F. " . . . Judge Dennis conducted herself in this case in a dishonest and corrupt manner, to facilitate and camouflage the illegal acts of the State Attorney's Office . . . "

G. "So what is being re-assigned are a series of legal deprivations of a fundamental character that Judge Dennis and the State Attorney's office want to sweep under the judicial cloak of their hand picked successor."

11. On October 17, 2001 and October 24, 2001, Respondent filed letters addressed to Judge Crespo with the Clerk of Court that contained further outrageous accusations and statements vilifying the integrity of the court and the officers of the court ("Composite Exhibit D"). Said letters included such statements as:

A. " . . . charge is sham, a fraud on the court, and the result of illegal and fraudulent in take, case filing, consolidation, certification and notarization procedures, involving numerous criminal acts by the State Attorney's office . . . "

B. " . . . the Court's very active role in encouraging me to provide an immunized proffer was merely a ruse towards some entrapment plot . . . making this court an active co-conspirator in the State's criminal violation . . . "

12. Respondent filed numerous other pleadings and documents in which he repeatedly made outrageous accusations and statements impugning the integrity of

judges and other officers of the court. A sampling of the other filings include:

A. Letter to Miami-Dade County Public Defender, Bennett Brummer dated March 26, 2001, filed in the *State of Florida v. Miles J. Gopman*; Eleventh Judicial Circuit case no. F01003508 on March 27, 2001 ("Exhibit E");

B. Letter to Judge Maria Espinosa Dennis dated March 26, 2001, filed in the *State of Florida v. Miles J. Gopman*; Eleventh Judicial Circuit case no. F01003508 on March 27, 2001 ("Exhibit F");

C. *Defendant's Supplemental Motion to Disqualify the Honorable Maria Espinosa Dennis*; filed in the *State of Florida v. Miles J. Gopman*; Eleventh Judicial Circuit case no. F01003508 on April 10, 2001 ("Exhibit G");

D. *Appellant's Appendix I to Notice of Interlocutory Appeal Containing Those Orders, Processes, Acts, Deprivations, and Derelictions of Judicial Responsibility for which Immediate Appellate Review is Sought, as Described in Paragraph (2) of Appellant's Notice of Interlocutory Appeal*; filed with the Third DCA on July 3, 2001 in *Gopman v. State of Florida*; case no. 3D01-1754 ("Exhibit H");

E. *Defendant Appellant's Index to Appendix IV*; filed with the Third DCA on July 3, 2001 in *Gopman v. State of Florida*; case no. 3D01-1754 ("Exhibit I").

13. By Reason of the foregoing, Respondent has violated Rules 3-4.3 (Misconduct and Minor Misconduct), 4-8.2(a) (Impugning Qualifications and Integrity of Judges

or Other Officers), and 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice . . .) of the Rules of Professional Conduct.

WHEREFORE, the Florida Bar respectfully requests that Miles Jay Gopman, Respondent, be appropriately disciplined in accordance with Chapter 3, Rules Regulating The Florida Bar.

Respectfully submitted,

/s/ Scott B. Saul
SCOTT B. SAUL,
Presiding Chair
Grievance Committee 11M
Florida Bar No. 717525
1351 Northwest 16th Street
Miami, Florida 33125
(305) 326-9901

/s/ William Mulligan
WILLIAM MULLIGAN
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444 Brickell Avenue Ste. M-100
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/s/ John Anthony Boggs
JOHN ANTHONY BOGGS
Staff Counsel
Florida Bar No. 253847
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399
(850) 561-5600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Complaint was served by U.S. Mail upon the **Honorable Thomas D. Hall**, Clerk, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida; and a true and correct copy upon Respondent, Miles Jay Gopman, Certified Mail Return Receipt Requested 7001 2510 0006 3826 8500, at Respondent's official record bar address, 2000 Towerside Terrace, Apartment 1208, Miami, Florida 33138, on this 20th day of January, 2004.

/s/ John Anthony Boggs
JOHN ANTHONY BOGGS
Staff Counsel

NOTICE OF TRIAL COUNSEL

PLEASE TAKE NOTICE that the trial counsel in this matter is William Mulligan, Bar Counsel, whose address and telephone number are 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, (305) 377-4445. Respondent need not address pleadings, correspondence, etc., in this matter to anyone other than trial counsel *and to John Anthony Boggs, Staff Counsel. The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300.*

APPENDIX L

[LOGO]

THE FLORIDA BAR
RIVERGATE PLAZA, SUITE M-100
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MIAMI, FL 33131-2404

JOHN F. HARKNESS, JR.
Executive Director

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Via Hand Delivery

November 24, 2004

Honorable Margarita Esquiroz, Referee
Dade County Courthouse
73 West Flagler Street
Room 635
Miami, Florida 33130

RE: The Florida Bar v. Miles Jay Gopman
The Florida Bar File No. 2003-71,056(11M)
Supreme Court Case No. SC04-87

Dear Judge Esquiroz:

Enclosed please find a proposed Report of Referee and The Florida Bar's Affidavit of Costs with regard to the above referenced matter.

If all meets with your Honor's approval kindly sign the Report of Referee and have your judicial assistant forward copies to counsel in the envelopes provided. The original Report of Referee should be mailed to the Supreme Court of Florida along with your file and filed electronically pursuant to Administrative Order No. AOSC04-84 of the Supreme Court of Florida at e-file@flcourts.org with the subject line reading "Filing in The Florida Bar v. Miles Jay Gopman, SC04-87". Additionally, I have attached a diskette

with a copy of the proposed Report of Referee for your convenience.

Thank you for your attention to the foregoing.

Yours truly,

/s/ William Mulligan
WILLIAM MULLIGAN
Bar Counsel

WM/ep
Enclosures

cc: Miles Jay Gopman, Esq.
(via regular mail, w/ enclosures)
John Anthony Boggs, Staff Counsel
(via regular mail, w/ enclosures)

APPENDIX M

IN THE SUPREME
COURT OF FLORIDA

THE FLORIDA BAR, Complainant, V. MILES J. GOPMAN, Respondent. /	SUPREME COURT CASE NO.: SC 04-87 The Florida Bar File No.: 2007-71, 056 (11M) FNB: 0226920

RESPONDENT'S AMENDED PETITION FOR REVIEW OF REFEREE'S REPORT, DATED DECEMBER 21st, 2004, AND FILED ON DECEMBER 27th, 2004

Respondent, MILES J. GOPMAN, appearing pro se, and pursuant to Rule 3-7.7(a) and (c), Rules *Reg. Fla.* Bar, files this petition for review of the Referee's Report, dated December 21st, 2004, and filed in the above referenced cause on December 27th, 2004, and states the following:

I. The Usurpation of Unauthorized And Undelegated Prosecutorial And Enforcement Powers By The Staff Of The Florida Bar's Division Of Lawyer Regulation To Oppress Respondent For His Exercise Of Constitutionally Protected And Privileged Activities, Related To His Successful Self-Representation In A State Prosecution Upon A Patently False Charge That Resulted From An Illegal Arrest

A. Violation of Respondent's Right To Substantive Due Process Under The United States Constitution By Staff Counsel's Act Of Opening A Disciplinary File In FEB Case No. 2003-71,056 (11M), And By Self-Initiating A Grievance Committee Proceeding, Based Solely Upon Staff Counsel's Personal Opinion That Respondent Had Made Objectionable Statements In Filings Related To His Own Defense

1. The above described acts violated the Supremacy clause of the United States Constitution, as provided in Article VI, Clause 2 thereof; and Respondent's subsidiary right to be free from coercive and excessive regulation and sanction through his compulsory membership in The Florida Bar, an illusory, non-existent State agency, which is the functional equivalent of a state wide labor organization. See *Keller v. State Bar of California,* 496 U.S. 1, 12-13 (1990). See also 29 U.S.C. § 157: Right of Self-organization, freedom to join or refrain from joining a labor organization.

2. The above described acts violated the doctrine of separation of powers and the corresponding guarantee of a Republican form of Government, contained in Article VI, Section 4, of the United States Constitution, and Respondent's subsidiary right to be free from arbitrary and capricious regulation and sanction through the [] exercise of sovereign enforcement authority by staff attorneys employed by The Florida Bar, a unified professional organization of Florida attorneys. See *Lathrop v. Donahue,* 367 U.S. 820, 853-855 (1961): concurring opinion by Justices Harlan and Frankfurter in plurality decision; and *Schechter Poultry Corp. v. United States,* 295 U.S. 495, 529-531 (1935).

3. The above described acts were an infringement upon Respondent's rights of free speech and association, as protected by the First Amendment Constitution, and

Respondent's corresponding right to be free of vexatious and intrusive regulation of his constitutionally protected activities. See *Keller v. State Bar of California*, 496 U.S. 1, 9 (1990); *Lathrop v. Donahue,* 367 U.S. 820, 882-885 (1961): dissenting opinion by Justice Douglas to plurality decision.

B. Violation Of Respondent's Right To Substantive Due Process Under The Florida Constitution By Staff Counsel's Act Of Opening A Disciplinary File In TFB Case No. 2003-71, 056 (11M), And By Self-Initiating A Grievance Committee Proceeding, In The Absence Of Any Complaint Presented To His Office Regarding Conduct Engaged In By Respondent Related To The Practice of Law, And In Absence of Any Express Or Derived Authorization For Self-Initiating A Disciplinary Case Under The Rules Regulating The Florida Bar.

1. The above described acts violated Respondent's rights under these provisions of the Florida Constitution: Article 1, Section 1 (Political Power); Article 1, Section 6 (Right To Work); Article 1, Section 4 (Freedom of Speech); Article 1, Section 9 (Due Process); Article 1, Section 16 (Right of Accused To Be Heard In Person); Article 1, Section 18 (Administrative Penalties); Article 1, Section 21 (Access To Courts); and Article II, Section 3 (Branches of Government).

2. Article V, Section 15 of Florida's Constitution confers no constitutional power upon this Court to delegate any sovereign authority over lawyer regulation to the unified state-wide lawyer association operating under the name of The Florida Bar.

3. The unified professional association of lawyers operating under the name of The Florida Bar is neither an executive department nor licensing board, upon which regulatory or enforcement authority is conferred under Article IV, Section 6 of Florida's Constitution.

4. The integration of all Florida attorneys into a unified statewide professional association was decreed for the limited purpose of imposing a membership fee that would be used by an organized bar to advance the administration of justice; it was not designed to create a self-functioning apparatus for lawyer regulation. See *Petition of Florida State Bar Association, et al.,* 40 So 2d 902, 908-909 (Fla. 1949).

5 As a safeguard against the integration of Florida attorneys into a unified Bar from becoming a vehicle for "a committee of lawyers" to exercise capricious disciplinary power over other members, this Court further decreed that "the investigation and trial of a lawyer for unprofessional conduct must be a judicial proceeding in the manner provided by law or rule of this Court . . . ". *Petition of Florida State Bar Association et al.,* 40 So 2d 902, 907 (Fla. 1949).

6) No delegation of authority for lawyer regulation is conferred upon the unified professional association of Florida attorneys operating under the name of The Florida Bar by virtue of Chapter 3, Rules *Reg. Fla.* Bar, nor upon the staff attorneys employed by The Florida Bar, either.

7) Pursuant to Rule 3-3.1, this Court has delegated authority to the following entities as its designated regulatory agencies: the board of governors, grievance committees and referees. The Complainant's staff counsel thus acted without designated authority, and beyond the legal

limits of his derived discretion, as defined and circumscribed by Rule 3-7.3, in pursuing a disciplinary case without being presented with an inquiry complaint for review. See *In Re The Integration Rule of The Florida Bar,* 103 So. 2d 873, 875 (Fla. 1956).

8) These acts by Complain[an]t's staff counsel entailed an open ended exercise of undelegated authority, in violation of Article 1, Section 9; Article 1, Section 18; and Article II, Section 3. See *B. H. v. State,* 645 So 2d 987, 992-994 (Fla. 1944).

II STAFF COUNSEL'S FRAUDULENT AND UNLAWFUL MANIPULATION OF THE GRIEVANCE PROCEEDING IN ORDER TO ORCHESTRATE A SHAM AND CONTRIVED PROBABLE CAUSE OUTCOME BY USE OF A FABRICATED DOCUMENT, CONSTITUTIONALLY TAINTED INFORMATION, A FALSE AND PERJURED CHARGING DOCUMENT, AND UPON A DISMISSED CHARGE, AND BY DEPRIVING RESPONDENT THE OPPORTUNITY TO APPEAR BEFORE THE GRIEVANCE COMMITTEE, ALL IN VIOLATION OF RESPONDENT'S SUBSTANTIVE AND PROCEDURAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION

A.) Staff Counsel's Made Use of A Fabricated And Forged Document Of False And Constitutionally Tainted Arrest Information, And Of A False Charge Upon A Perjured And Invalid Charging Document, To Contaminate The Grievance Process, Which Were So Patently Prejudicial To The Respondent's Entitlement To Fair Treatment By The Grievance Committee As To Have Violated His Substantive Rights To Due Process And Equal Protection Of Law.

1) Staff Counsel knowingly, willfully and with intent to deprive Respondent of a fair hearing before the grievance committee, placed a forged and fabricated document before the grievance committee, which staff counsel for Complainant falsely claimed to have been obtained from the State File in Case No. F-01-3508.

2) This forged and fabricated document was a form complaint of the Agency Health Care Administration, undated and never filed, in which Respondent purports to make incriminating hand written statements about Respondent's former wife, Vivian Gopman, and himself.

3) Respondent informed Complain[an]t's staff counsel, in a letter dated February 21st, 2003, that this was a forged and fabricated document, and that it was alien to file in Case No. F-01-3508, yet staff counsel failed and refused to withdraw this fabricated document from his presentation to the grievance committee.

4) It was a matter of record in Case No.: F-02-3508 that at the suppression hearing held before Dade Circuit Judge Manuel Crespo, on March 25th, 2002, occurring nearly fourteen (14) months after Respondent's arrest on February 1st, 2001, upon the false charge of NO HARM NEGLECT of an alleged disabled person, the Respondent's motions to suppress and dismiss were granted.

5) The Complainant's staff counsel had been communicating with the State Attorney's Office with respect to this case as early as April 11th, 2001, and had secretly opened an investigation file in this matter, under TFB No. 2001-71, 288 (11M-MMO), long before first communicating with the Respondent in connection with this case, by letter dated February 19th, 2003, under new TFB File No. 2003-71, 056 (11M).

6) Based upon staff counsel's undisclosed contacts with the Dade State Attorney's Office, he had been informed that the charge of disabled neglect had been dismissed upon "Legal Grounds", and that the State Attorney's Office had decided not to appeal the dismissal.

7) In addition, staff counsel was informed that the State Attorney's Office had nolle prosecuted the collateral charge against Respondent's former wife, Vivian Gopman, of operating an assisted living facility without a license, which charge had been mis-joined with the charge against Respondent of No Harm Neglect in Case No. F-01-3508.

8) Despite this knowledge that the separate and mis-joined charges against Respondent and his former wife in Case No. F-01-3508 had been dismissed, Complainant's staff counsel presented the charging document, containing both those charges, to the grievance committee, while failing or refusing to inform the grievance committee of the dismissals.

9) Based upon information contained in the file in Case No. F-01-3508, and as Respondent had further advised in correspondence with the Complainant's staff counsel, the State charging document was facially defective, legally insufficient and void for each of the following reasons:

a) The name of the intake ASA appearing on the charging document as "Jane Hyde", was an alias name that did not refer to anyone registered among the membership of The Florida Bar, thereby making the performance of intake functions under this alias, unofficial bar name a violation of Rule 1-3.3, Rules *Reg. Fla.* Bar; a violation of *Fla. Stat.* § 27.181(1) and (2); and Rule 3.115, *Fla. R. Crim. P.*

b) The intake alias named Jane Hyde had initially caused the separate and distinct arrest documents against Respondent and his former wife, Vivian Gopman, to be filed under different case numbers, to with F-01-3508 and F-01-3509, respectively, which were assigned to Judges Ferrer and Schumaker, respectively.

c) The intake alias named Jane Hyde then prepared an unsigned Information in which the separate and distinct charges against Respondent and his former wife, Vivian Gopman, were combined as Case F-01-3508A and Case F-01-3508B, respectively, and therefore mis-joined in violation of Rule 3.150, *Fla. R. Crim. P.*

d) The intake alias Jane Hyde did not sign and file the Information with the Clerk of the Criminal Division of the Dade Circuit Court, but instead caused this unsigned and unfiled Information to be date stamped with the office of Judge Maria Espinosa Dennis, in violation of Rules 3.115 and 3.140(g), *Fla. R. Crim. P.*

e) The intake alias Jane Hyde caused the unlawful consolidation of the mis-joined charges before Judge Dennis, without motion and court order, in violation of Rule 3.151, *Fla. R. Crim. P.*

f) The charging document purports to be signed by a different ASA, whose bar number appearing thereon belongs to Michael T. Strozier, though he performed no intake functions in this case, making the signature, oath and certification thereon prejurious and presumptively forged, in violation of Rule 3.140(g), *Fla. R. Crim. P.*; and the charging document a nullity under Article 1, Section 15(a) of the Florida Constitution. See *Ricks v. State, Etc.*, 163 So. 2d 588 (Fla. 1935), overruled by *State v. Muller*,

313 So. 2d 656 (Fla. 1975), only insofar as there is compliance with Rules 3.115 and 3.140(g), and *Fla. Stat.* § 27.181(1) and (2).

g) Every stage of the criminal proceeding was invalid for being based upon improperly consolidated and misjoined offenses, which worked to undermine the spousal immunity of Respondent and his then estranged wife, Vivian Gopman, and Respondent's right to a speedy trial, in violation of Rule 3.152(a) and (b), *Fla. R. Crim. P.* See *Jackson v. Wainright,* 298 So. 2d 433 (4th DCA 1974); *Rubin v. State,* 407 So. 2d 961 (4th DCA 1982).

h) Every stage of the proceeding was invalid for being based upon the constitutionally impermissible charge of NO HARM NEGLECT of an alleged disabled person, that was deficient in failing to allege the essential elements of "Caregiver" status and criminal neglect, as described in *Fla. Stat.* § 825.101(2) and 825.102(3)(a). See *Sieniarecki v. State,* 756 So. 2d 68, 70 (Fla. 2000).

I) Every stage of the proceeding was based upon an insufficient allegation of NO HARM NEGLECT, which never rose beyond a bare recital of culpable negligence without harm, that alleged nothing more than a second degree misdemeanor within confines of *Fla. Stat.* § 784.05(1). See *Polokoff v. State,* 586 So. 2d 385, 390-91 (5th DCA 1991).

j) Every stage of the proceeding was predicated upon the non-existent charge of NO- HARM NEGLECT, in reliance upon the mere recital of the lesser of the two penalty provisions for Section 825.102(3), under subsection (c). See *Harrison v. State,* 641 So. 2d 486 (5th DCA 1994); *Fla. Stat.* §§ 775.021(1) and 775.021(4)(b)1 (Rule of Lenity).

10) In addition, the Complainant's staff counsel knowingly presented tainted and false arrest information to the grievance committee, despite Respondent's objection that this was all the fruit of a warrant-less arrest inside his residence, and without probable cause, and which had been so found at the suppression hearing before Judge Crespo on March 25th, 2002.

11) The Complain[an]t's staff counsel, acting in a surrogate capacity for the Dade State Attorney's Office, by virtue of claiming to have obtained all his documents from the "State File" in Case No. F-01-3508, did violate Respondent's rights under the Fourth Amendment to the United States Constitution, and under Article 1, Section 12 of Florida's Constitution, by presenting to the grievance committee the tainted arrest information and police reports that had been derived from illegal and unconstitutional state action. See *Payton v. New York,* 445 U.S. 573 (1980); *United States v. Crews,* 445 U.S. 463, 100 S. Ct. 1244, 1249 (1980). See also *Hatcher v. State,* 834 So. 2d 314 (5th DCA 2003); *Davis v. State,* 834 So. 2d 322 (5th DCA 2003).

12) The Complainant's staff counsel also prejudiced Respondent's constitutional rights by using the false and tainted allegations of the Information in Case No. F-01-3508 before the grievance committee, knowing this to be nothing more than unfounded, naked allegations, that were likewise the product of an illegal arrest.

13) Pursuant to the 14th Amendment to the United States Constitution and Article 1, Sections 2 and 9 of Florida Constitution, Respondent's was entitled to fair and impartial treatment by a grievance committee, and to the full panoply of protections against any improper or unwarranted use of

the disciplinary procedures delineated in Chapter 3, Rules *Reg. Fla.* Bar. See *M. W. v Davis,* 756 So. 2d 90 (Fla. 2000); *J. B. v. Dept Of Children and Family Services,* 768 So. 2d 1060 (Fla. 2000).

14) Complain[an]t's staff counsel subverted Respondent's protections under Rule 3-3.2(b), Rule 3-3.4(c) and Rule 3-7.4(g), by his above described acts of presenting fabricated, false, suppressed and unlawfully derived documents and information from the "State file" in Case No. F-01-3508, and did thereby procure a probable cause outcome that was contaminated by this tainted information, and by these due process violations.

B) Staff Counsel's "Selected" Use of Documents from The "State File" In Case No. F-01-3508, His Refusal To Afford Respondent The Opportunity To Be Heard At The Meeting He Arbitrarily Scheduled On March 26th, 2003, His Unilateral And Capricious Decision That The Matter Would "Be Heard On Those Documents Only" And His Arbitrary And Capricious Decision Regarding The Rule Violations He Intended To Charge Violated Respondent's Right To Procedural Process And To Confront His Accuser.

1) By letter dated February 19th, 2003, Complainant's staff counsel requested "a response addressing [Respondent's] arrest on or about February 1st, 2001 and subsequent felony charge for neglect of an Elderly or Disabled Adult-No Harm". Staff Counsel further enclosed a package of assorted documents filed in Case No F-01-3508, and inquired as to their "compliance with Rule 4-8.2(a)", without identifying any particular document, nor statement therein, which he wanted Respondent to address.

2) The package of documents also included the forged and fabricated complaint form of the Agency For Health Care Administration, that Staff counsel falsely claimed to have been obtained from the "State file". After receiving Respondent's certified letter dated February 21st, 2003, on February 24th, 2005, Complainant's staff counsel gave notice to the "Members of The Grievance Committee (11M)" on February 25th, 2003, of the "PAPER HEARING" that would be held on March 26th, 2003, and of the materials to be reviewed that consisted of "Selected documents from the State file in *State of Florida v. Miles J. Gopman,* Case No. F-01-3508" along with Respondent's Letter to him dated February 21st, 2003.

3) In his letter to the grievance committee, Complainant's staff counsel informed the grievance committee that: "This Matter will be heard based on those documents only. Live testimony *will not* be presented". In addition, the staff counsel expanded upon his initial inquiry related solely to compliance with Rule 4-8.2(a), by listing "Rules 3-4.3 and 3-4.4 of the Rules of Discipline and 4-8.2(a), 4-8.4(b) and 4-8.4(d) of the Rules of Professional Conduct", and stating that these were the "rule violations that I have charged the respondent with potentially violating".

4) In a letter to the Complainant's staff counsel dated March 17th, 2003, Respondent expressed his willingness to meet with the grievance committee, or any representative thereof, to address the rule violations he had "charged"; and to present additional documents relevant to the issues of judicially condoned prosecutorial misconduct during the course of the proceeding. This involved the deliberate violation of judicially approved and State conferred immunity, as demonstrated by his transcript immunized testimony given on July 31st, 2001, which

transcript had been placed in the open file in Case No. F-01-3508; and involved the willfull violation of Respondent's right to speedy trial, due to the mis-joining of the separate and distinct charges against him and his then estranged wife, Vivian Gopman.

5) In his letter of March 17th, 2003, Respondent made a reasoned response to the unspecified nature of the additional Rule violations that Complain[an]t's Staff counsel intended to charge, and informed him that charges of dishonest, unlawful or criminal conduct, in violation of Rules 3-4.3 and 3-4.4, and Rule 4-8.4(b), were unfounded in the record of Case No. F-01-3508, and were therefore unsupported by any material he had obtained from the "State file".

6) This notwithstanding, the Complain[an]t's staff counsel failed and/or refused to permit Respondent to personally appear before the grievance committee, nor did he give subsequent notice to the members of the grievance committee of the additional materials and information that Respondent had sought to bring to their attention in his letter of March 17th, 2003.

7) Procedural due process requires both fair notice and a real opportunity to be heard. *Keys Citizens, etc. v. Florida Keys Aqueduct Authority,* 795 So. 2d 940 (Fla. 2001). Procedural due process is intended to assure fair treatment through the proper administration of justice, *M. W. v Davis,* 756 So. 2d 90 (Fla. 2000).

8) The acts of the Complainant's staff counsel impaired and circumvented Respondent's right to be heard, as provided in Rule 3-7.4(1), Rules *Reg. Fla.* Bar, and this enabled the staff counsel to procure a probable cause

outcome upon his ex parte presentation, that violated procedural due process.

9) The right of confrontation is an essential ingredient of due process. *In Re Integration Rule Of the Florida Bar,* 103 So. 2d 873, 876 (Fla. 1956). Respondent had the right to face his accuser, which in this case is the Complainant's staff counsel, himself, who employed the contrivance of a "PAPER HEARING", whereat "live testimony *will not* be presented", so as to enable him to gain unfettered ex-parte use of Respondent's filings, and thereby procure the probable cause outcome in violation of Respondent's right of confrontation. See *Crawford v. Washington,* Case No. 02-9410, United States Supreme Court, October Term, 2003.

C) Complainant's Staff Counsel Made Prohibited Use Of Constitutionally Protected Documents And Information, In Violation Of Respondent's Privileges And Immunities Under Federal And State Law.

1) The "Selected" documents that Complain[an]t's Staff Counsel relied upon before the grievance committee can be separated into four different groups, related to different though partly overlapping periods during the course of the proceeding.

a) Motions to dismiss filed before Judge Maria Espinosa, asserting prosecutorial misconduct in bringing a false charge, arising from an illegal arrest, upon a facially defective, factually insufficient and legally deficient charging document, as indicated in Section II(A)(9)(a)-(j) above; and Respondent's motions and correspondence with Judge Dennis seeking the discharge of the Public Defender's Office for reasons of

incompetent and inadequate representation, in failing to pursue Respondent's motions to dismiss, and by undermining his defense.

b) Motions For Disqualification directed at the conduct of Judge Dennis for condoning the misconduct by the State Attorney's Office and the Public Defender's Office, which was depriving Respondent of his legal rights and to an effective defense, and for coercively ordering Respondent's competency evaluation, over his adamant objection, as opposed to conducting the required *Faretta* inquiry pursuant to Rule 3.111(d), *Fla. R. Crim. P.*, and for thereby oppressing Respondent for asserting and exercising his 6th Amendment Right of Self Representation.

c) Appendices filed pursuant to Rule 9.220, *Fla. R. App. P.*, that were required pursuant to Rules 9.130(a) and (e), and Rule 9.140(b), *Fla. R. App. P.* in connection with an interlocutory appeal taken by Respondent during the pendency of the criminal proceeding, in order to create an appellate record documenting the alleged irreparable injury being suffered by the constitutional violations and illegal acts being condoned in the Circuit Court.

d) Correspondence to Judge Crespo in relation to the setting of hearings upon Respondent's motion for discharge for violation of speedy trial, motion for *Kastigar* immunity/taint hearing, and for a suppression hearing based upon an in house custodial interrogation and warrant-less arrest without probable cause.

2) Respondent's motions to dismiss and other filings complaining about prosecutorial misconduct and the ineffective representation by the Public Defender's Office, and his filings in support of his interlocutory appeal are protected by Article 1, Section 16(a) (Right of accused to be

heard), and by Article 1, Section 21 (Access to courts) of Florida's Constitution.

3) The motions for disqualification complaining about Judge Dennis' unfairness and manifest bias in condoning acts of prosecutorial misconduct and in oppressing Respondent for attempting to exercise his 6th Amendment right of self-representation are protected by the common law litigative immunity and free speech immunity conferred by Article 1, Section 4 of Florida's Constitution. See *State etc. v. Sullivan,* 26 So. 2d 509, 515 (Fla. 1946).

4) The motions for disqualification are authorized and protected speech, pursuant to *Fla. State.* § 38.10 and Rule 2.160, *Fla. R. Jud. Admin.*, which are governed by the subjective standard of sufficiency, that focus exclusively upon the reasonableness rather than the accuracy of Respondent's fear of bias or prejudice in relation to his sworn allegations of unfairness or partiality in the course of a proceeding. See *Tableau Fine Art Group. Inc., v Jacobi,* 853 So. 2d 299 (Fla. 2003); *Rogers v State,* 630 So. 2d 513, 515 (Fla. 1993); *Bundy v. Rudd,* 366 So. 2d 440 (Fla. 1978).

5) The Respondent had a 6th Amendment right to claim ineffective assistance of counsel, and to seek the discharge of The Public Defender's Office. *Strickland v. Washington*, 466 U.S. 668 (1984); *Faretta v. California*, 422 U.S. 806 (1975). Respondent had the 6th Amendment right to allege a conflict of interest by the Public Defender's Office. *Cuyler v. Sullivan*, 446 U.S. 3356 (1980).

6) To assure the record adequately established Respondent's invocation of these 6th Amendment rights, it was encumbent upon him to impugn the adequacy of his

representation by the Public Defender's Office. See *Gamble v. State*, 877 So. 2d 706, 716-718 (Fla. 2004).

7) Respondent had the corresponding right to impugn the fairness and impartiality of Judge Dennis, for failing to conduct a *Faretta* inquiry and for ordering a coerced competency evaluation instead, which thereby burdened and obstructed the exercise of Respondent's 6th Amendment rights. See *Kearse v. State*, 858 So. 2d 348 (1st DCA 2003).

8) By priority letter mailed and faxed to Complain[an]t's staff counsel on March 25th, 2003 (misdated March 27th, 2003), Respondent called attention to the false and tainted nature of the information he had obtained from the "State file"; and the statutory and constitutional prohibitions against this disciplinary proceeding in reliance thereon.

9) In this letter, Respondent called attention to his immunized testimony before Judge Crespo on July 31st, 2001, after the Public Defender's Office had been discharged, and that the Dade State Attorney's Office had reneged on his gesture of cooperation, so as to induce Respondent's former wife, Vivian Gopman, to enter into a diversion program, in exchange for her agreement to become a witness against Respondent. This constituted a patent and willful violation of *Kastigar v. U.S.*, 406 U.S. 441 (1972).

10) When the prosecution fails to implement "reliable procedures for segregating the immunized testimony and its fruits", its burden to disprove taint is "virtually insurmountable". *U. S. v. Hampton*, 775 F 2d 1479, 1490 (11th Cir. 1985). The taint that *Kastigar* casts upon immunized testimony expands over time, covering any direct or indirect use, including tactical and testimonial influences.

U.S. v. North, 920 F. 2d 940 (D.C. Cir. 1990); *U.S. v. McDaniel,* 482 F. 2d 305 (8th Cir. 1973).

11) Respondent's correspondence to Judge Crespo that used harshly critical language for his role in inducing Respondent, an unrepresented defendant, to give immunized testimony to the State, and then condoning the State's bad faith violation of this constitutional protection, by now failing to hold a *Kastigar* taint hearing, was appropriate to the gravity of the constitutional violation that Judge Crespo had allowed to occur; and was therefore equally protected speech that resulted from this *Kastigar* violation. See *U.S. v. Hampton,* 775 F. 2d 1479 (11th Cir. 1985).

12) The *Kastigar* opinion established that the use immunity privilege extends to "any proceeding civil or criminal, administrative, or judicial, investigatory or adjudicatory". The protection against self-incrimination is recognized in all types of proceedings, including State administrative proceedings. See *State etc., v Kelly,* 71 So. 2d 887 (Fla. 1954); *Best Pool & Spa Service Co., Inc. v. Romanik,* 622 So. 2d 65 (4th DCA 1993).

13) In addition, by merely providing testimony in a proceeding related to the operation of an assisted living facility, Respondent became entitled to the State transactional "immunity from any civil or criminal liability therefore" conferred by *Fla. Stat.* § 400.428(7).

14) The Complainant's Staff counsel relied exclusively upon illegally seized, suppressed, and constitutionally protected or immunized information before the grievance committee, thereby tainting the probable cause outcome as prohibited "fruit of the poisonous tree". *New York v. Harris,* 495 U.S. 14 (1990).

D) Complainant's Staff Counsel Used Contrived, Dishonest And Collusive Methods To Orchestrate A Sham And Fraudulent Probable Cause Outcome.

1) Upon receiving Respondent's certified letter dated February 21st, 2003, on February 24th, 2003, informing him that he had included a forged and fabricated document in the package of materials from the "State file", and that this phony document was never part of the "State File", the staff counsel issued notice to the members of the grievance committee of the "PAPER HEARING" on March 26th, 2003.

2) The Complainant's staff counsel contrived this "PAPER HEARING" so as to preclude Respondent's personal appearance before the grievance committee, so that Respondent could not expose staff counsel as a fabricator and falsifier, and so as to prevent Respondent from confronting his false accusations and thereby overcoming the staff counsel's pursuit of a probable cause outcome through dishonest means.

3) Complainant's staff counsel further retaliated against Respondent for exposing him as a fabricator and falsifier in his letter of February 21st, 2003, by expanding the Rule violations he intended to charge to include malicious and defamatory accusations of unlawful and criminal acts, in unfounded reliance upon Rules 3-4.3, 3-4.4 and 4-8.4(b).

4) Only as a consequence of Respondent's letter to Complainant's staff counsel of March 17th, 2003, that noted the impropriety and illegitimacy of a grievance committee voting probable cause to find that Respondent had committed a crime, when Judge Crespo, on March 25th, 2002, had judicially determined that the subject charge

could not be sustained as a matter of law, which finding the State had accepted by its decision not to appeal, did the staff counsel eliminate the charges of criminal misconduct based upon Rule 3-4.4 and Rule 4-8.4(b) from consideration by the grievance committee.

5) Complainant's staff counsel still refused to eliminate the more amorphous charge of unlawful conduct under Rule 3-4.3, without any basis for this charge in the materials from the "State file" except for the forged and fabricated statements on the undated and unfiled complaint form of the Agency for Health Care Administration (AHCA).

6) Complainant's staff counsel acted deceitfully in submitting the alien AHCA complaint form to the grievance committee, despite what purport to be incriminating statements made by Respondent about himself and his former wife, Vivian Gopman; despite knowing that this is a forged and fabricated document; and despite knowing it had not come from the "State file" in Case No. F-01-3508, which deception the staff counsel maintained so as not to concede his fraudulent act.

7) Complainant's staff counsel used the forged and fabricated AHCA complaint to poison the proceeding before the grievance committee, and thereby did obtain a sham and fraudulently procured probable cause vote with respect to the amorphous and ambiguous Rule 3-4.3.

8) Complainant's staff counsel acted dishonestly by including the patently inapplicable and jurisdictionally invalid charge related to Rule 4-8.4(d), despite knowing that this violation, by its very language, and based upon this Court's decision in *The Florida Bar v. Brake*, 767 So. 2d 1163, 1167 (Fla. 2000), and this Court's seminal decision on the meaning of the practice of law, in *The Florida Bar v.*

Sperry, 140 So. 2d 587, 591 (Fla. 1962), could not apply to Respondent's acts of defending himself in a criminal prosecution.

9) Complain[an]t's staff counsel acted dishonestly by including the unfounded charge related to Rule 4-8.4(d), knowing that Respondent could not have engaged in conduct that was "prejudicial to the administration of justice", given his knowledge that on March 25th, 2002, Judge Crespo had granted Respondent's motion to suppress and dismiss the State's prosecution, upon finding the arrest to have been unlawful and that the charge was insupportable as a matter of law and that the State had accepted that finding by its decision not to appeal; and by failing to bring these facts to the attention of the grievance committee.

10) Complainant's staff counsel acted dishonestly by including the constitutionally prohibited charge related to Rule 4-8.4(d), since all of Respondent's acts of self-representation in a criminal prosecution are protected under the 6th Amendment to the United States Constitution, and privileged under Article 1, Sections 2,4, 16(a) and 21, Florida Constitution. *Faretta v. California,* 422 U.S. 806 (1975); *The Florida Bar v. Brumbaugh,* 355 So. 2d 1186, 1190-92 (Fla. 1978).

11) Complainant's Staff Counsel likewise used the forged and fabricated AHCA compliant form, which he falsely represented to have come from the "State file", in order to obtain a sham and fraudulently procured probable cause vote with respect to the patently inapplicable Rule 4-8.4(d), by raising an irrational inference from the incriminating statements purportedly made by Respondent in that fabricated document that Respondent had somehow escaped the administration of justice.

12) In furtherance of this irrational inference, that poisoned the grievance committee proceeding, the Complain[an]t's Staff Counsel relied upon Respondent's filings in Case No. F-01-3508, for the charge related to Rule 4-8.2(a), consisting of motions for disqualification, appendices to an interlocutory appeal, and correspondence with the Court critical of judicial indifference to various forms of prosecutorial misconduct, and of the Court's failure to set hearings on pending motions to dismiss so that these matters could be addressed.

13) The Complainant's staff counsel thereby used the charges related to Rule 3-4.3, Rule 4-8.2(a) and Rule 4-8.4(d), along with the forged and fabricated AH[CA] complaint form, to cross reinforce each other, when none could stand on its own, by relying upon Respondent's harshly worded criticisms of judicial condonation of patent constitutional violations by the Public Defender's Office and the State Attorney's Office to raise an irrational inference that Respondent had been successful in his own defense by somehow prejudicing the administration of justice.

14) The irrationality of this inference is evident from the fact that Complainant's staff counsel, after being challenged in Respondent's letter of March 17th, 2003, did eliminate allegations of criminal conduct based upon Rule 3-4.4 and Rule 4-8.4(b), though a residual undercurrent for this irrational inference was propagated through the retention of the new charges related to Rules 3-4.3 and 4-8.4(d).

15) The irrationality of this inference is further made evident from the fact that No member of the grievance committee sought to add any other charges beyond what Complainant's staff counsel intended to charge, so it is

telling that Respondent was not charged with any of the following rule violations that are pre-requisites to the violations that staff counsel had charged: Rules 4-3.3(a)(1) and 4-3.3(a)(4) – Candor Toward The Tribunal; Rules 4-3.5(a) and (b) – Impartiality And Decorum Of The Tribunal; Rule 4-8.4(c) – Conduct involving dishonesty, fraud, deceit, or misrepresentation.

16) The Complain[an]t's staff counsel did thereby obtain a sham and fraudulently procured probable cause outcome for Rules 3-4.3, 4-8.2(a) and 4-8.4(d), that was inconsistent with the absence of charges related to Rules 3-4.4, 4-3.3(a)(1) and (a)(4), 4-3.5(a) and (b), and 4-8.4(c), and was vitiated thereby.

17) Staff counsel's reliance upon Respondent's motions for disqualification filed in Case No. F-01-3508, to support the charge related to Rule 4-8.2(a), would have necessitated a determination by the grievance committee of the sufficiency of Respondent's sworn statements therein, which is purely a judicial function pursuant to *Fla. Stat.* § 38.10 and Rule 2.160, *Fla. R. Jud. Admin.* See *Tableau Fine Art Group, Inc. v. Jacoboni,* 853 So. 2d 299 (Fla. 2003), *Shah v Harding,* 839 So. 2d 765 (3rd DCA 2003).

18) Staff counsel's use of Respondent's motions for disqualification filed in Case No. F-01-3508, to support the charge related to Rule 4-8.2(a), would have necessitated that the grievance committee consider the accuracy of Respondent's sworn statements therein, which is an inquiry that *Fla. Stat.* § 38.10 and Rule 2.160, *Fla. R. Jud. Admin.* absolutely prohibit. *Hollywood v. Witt,* 868 So. 2d 1214 (4th DCA 2004); *Hewitt v. State,* 839 So. 2d 763 (4th DCA 2003).

19) The function of *Fla. Stat* § 38.10 and Rule 2.160, *Fla. R. Jud. Admin.*, transcends the objective of Rule 4-8.2(a), Rules *Reg. Fla.* Bar, in protecting the judiciary against unwarranted attacks that could erode public confidence in the court system, because:

> "This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge . . . The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice".

Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992). The procedures that govern disqualification motions are themself designed "to ensure public confidence in the integrity of the judicial system". *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983).

20) The question of disqualification focuses solely upon "what feeling resides in the affiant's mind and the basis for such feeling", so that if the facts alleged "are reasonably sufficient to create such a fear, it is not for the trial judge to say that it is not there". *Rogers v. State*, 630 So. 2d 513, 515 (Fla. 1993). As such, no judge may look beyond the mere legal sufficiency of a motion for disqualification and attempt to refute the charges of partiality. *Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978).

21) *Fla. Stat.* § 38.10 and Rule 2.160, *Fla. R. Jud. Admin.*, provide the authorized means to impugn the impartiality of a trial judge, which focuses exclusively upon the subjective sufficiency of the movant's belief of bias or prejudice, and does thereby establish a zone of constitutionally protected speech to justify removing the presiding judge in a case.

22) Complainant's staff counsel engaged in unlawful and constitutionally prohibited activity by questioning the subjective sufficiency of Respondent's fear of judicial bias and prejudice, in charging Respondent with violating Rule 4-8.2(a), based upon the motions for disqualification that Respondent filed in Case No. F-01-3508.

23) Complainant's staff counsel colluded with attorney Scott B. Saul, the chair of the grievance committee to contrive a sham and fraudulent probable cause outcome, that attorney Saul would later exploit for his financial advantage.

24) The complaint in this case is dated January 20th, 2004, and signed by attorney Scott B. Saul, as the presiding Chair of the grievance committee (11M), along with staff counsel for Complainant.

25) Shortly after authorizing the filing of the complaint on behalf of the grievance committee, (11M), attorney Scott B. Saul ended his chairmanship with the grievance committee, and began announcing his availability for bar grievance defense, in large, quarter page advertisements, such as the one appearing on page 13 of the March 15th, 2004 edition of The Florida Bar News, under "Disciplinary Actions".

26) In this advertisement, attorney Saul represents himself to be "a former chair for a Miami Bar Grievance Committee and a Criminal Defense Attorney with over 180 jury verdicts". The advertisement contains the following advice to the legal professional:

> "The adage 'He who represents himself has a fool for a client' can be very, very real!"

27) In his advertisement, attorney Saul hyped his experience as chairman of grievance committee (11M) for this quoted observation:

> "After serving my term on a grievance committee, I witnessed many tactical errors in lawyers representing themselves in disciplinary matters".

28) The fact that attorney Saul expected to use his experience as a chairman of grievance committee (11M) as a springboard for his new area of practice in bar grievance defense, by exploiting the "tactical errors" of lawyers who had represented themself before his committee, disqualified him from performing any grievance committee function in Respondent's case, as mandated by Rules 3-14(c)(2)-(c)(4), Rules *Reg. Fla.* Bar.

29) The Complain[an]t's staff counsel and chair Saul colluded in contriving the "PAPER HEARING" on March 26th, 2003, based solely upon their "selected documents from the State file", in order to exclude Respondent's appearance before attorney Saul's grievance committee, and thereby enabling attorney Saul to gain a professional advantage from the disciplinary complaint against Respondent as an example of what occurs when the self-representing attorney "has a fool for a Client".

III THE COMPLAINT IS A PROHIBITED EXERCISE OF UNDELEGATED ENFORCEMENT POWER BROUGHT IN THE NAME OF AN ILLUSORY STATE AGENCY, THAT IS THE PRODUCT ILLEGALLY OBTAINED, SUPPRESSED AND/OR IMMUNE INFORMATION, THAT IS BASED UPON CONSTITUTIONALLY PROTECTED SPEECH AND CONDUCT, THAT RESULTED FROM UNLAWFUL AND CONTRIVED GRIEVANCE PROCEDURES, THAT ALLEGES UNAUTHORIZED AND INVALID VIOLATIONS AND IS SHAM AND FRAUDULENT PLEADING

A) The Prohibited And Illegal Nature of The Bar's Complaint

1) The prohibited and constitutionally infirm nature of this disciplinary proceeding, is described in Section I, (A) & (B), above.

2) The illegal and constitutionally precluded forms of the information upon which the charges alleged in the Complaint are based are described in Section II, (A) & (C), above.

3) The unlawful, sham and contrived grievance procedures that produced the Complaint are described in Section II (B) & (D), above.

B) The Compliant's Reliance Upon Rule 3-4.3 To Reinforce Charges Related To Rules 4-8.2(a) and 4-8.4(d) Demonstrates Why Rule 3-4.3 Is Unconstitutionally Vague And Overb[roa]d, Therefore Violating Due Process And Equal Protection.

1) Rule 3-4.3 is facially incompatible with the notice and enforcement standards expressed in Rule 3-4.1 and Rule 3-4.2,

by being expressly designed to cover types of misconduct not enumerated in Chapter 4, nor otherwise specified as a grounds for discipline.

2) Rule 3-4.3 is by design and reach, open ended and indefinite, and therefore violates due process in failing to give adequate notice of what is proscribed. *D'Alembert v Anderson,* 349 So. 2d 164 (Fla. 1977); *B. H. v. State*, 645 So. 2d 987 (Fla. 1994).

3) Rule 3-4.3 is unconstitutionally overb[roa]d as applied in this case, in that the Complainant has exploited the vagueness of the phrase "any act that is unlawful or contrary to honesty and justice" in applying it to constitutionally protected conduct and speech. *Russ v. State,* 832 So. 2d 901 (1st DCA 2002).

4) Rule 3-4.3 operated here to invite an invalid exercise of delegated authority, in violation of Article I, Section 6 of the Florida Constitution, that cannot survive strict scrutiny of its application to the conduct being sanctioned. *Coastal Florida Police Benevolent Association v. Williams,* 838 So. 2d 543, 548-49 (Fla. 2003); *Chiles v. State Employees Attorneys Guild,* 743 So. 2d 1030, 1033 (Fla. 1999).

5) Complaint's reliance on Rule 3-4.3 in this case involved an invalid exercise of delegated authority, in violation of Article I, Section 6, based upon the statutory definition of an invalid exercise of delegated legislative authority under *Fla. Stat.* § 120.52(8)(d) and (e), for inviting unbridled disciplinary discretion, and arbitrary and capricious disciplinary action.

6) The failure to safeguard Respondent against an invalid exercise of delegated authority, through the use of Rule 3-4.3 to regulate protected speech and conduct, and

to sanction Respondent for the exercise of rights guaranteed by Article I, Section 4 (Free Speech) and Section 21 (Access To Courts), violated Respondent's right of equal protection under the 14th Amendment to the United States Constitution, and Article I, Section 2 of Florida's Constitution.

7) The failure to afford Respondent a means to personally challenge the validity of Rule 3-4.3 as applied by Complainant in this case, in the manner available to all other licensed professionals and regulated trades pursuant to *Fla. Stat.* Sections 120.54(1)(a), (3)(c) and (7), and Sections 120.56(1) and (3), violates his right of equal protection under the 14th Amendment to the United States Constitution, and Article I, Section 2 of the Florida Constitution.

C) The Complaint Lacks Forum And/Or Subject Matter Jurisdiction In Attempting To Regulate Protected Speech And Conduct

1) Respondent's acts of self-representation against a State prosecution is protected conduct under the 6th Amendment to the United States Constitution, and is therefore outside of lawyer regulation. See *The Florida Bar v. Brumbaugh,* 355 So. 2d 1186, 1190-92 (Fla. 1978).

2) None of the violations charged concern conduct by Respondent while acting as an attorney, or while engaged in the practice of law. *The Florida Bar v. Sperry,* 140 So. 2d 587 (Fla. 1962); *The Florida Bar v. Brake,* 767 So. 2d 1163 (Fla. 2000).

3) Respondent's reliance upon *Fla. Stat.* § 38.10 and Rule 2.160, *Fla. R. Jud. Admin.* to file motions for disqualification, predicated on his sworn allegations expressing his

fear of judicial partiality and prejudice, is protected conduct that assures the most essential requirements of due process. *In Re Murchison,* 349 U.S. 133, 136 (1995).

Respondent's reliance upon Fla. Stat. § 38.10 and Rule 2.160, *Fla. R. Jud. Admin.* in filing motions for disqualification, whereby he was required to set forth sworn allegations describing the reasons for fearing he could not receive fair judicial treatment, that are shielded from factual scrutiny or refutation, raises a litigative privilege that is immune from disciplinary sanction. See *State. Etc. v. Sullivan,* 26 So. 2d 509, 515 (Fla. 1949); *Rogers v. State* 630 So. 2d 513, 515-16 (Fla. 1993).

D) The Complaint Fails To Allege Facts That State The Elements Of The Violations Charged

1) The Complaint alleges no facts that describe unlawful acts contrary to honesty and justice within the meaning of Rule 3-4.3, apart from some sham and irrational inference arising upon the inclusion of the felony charge in Case No. F-01-3508 without mention of its dismissal.

2) Because the same allegations are used support charges related to Rules 3-4.3, 4.8.2(a) and 4-8.4(d), and because of the general character of Rule 3-4.3 is expressly designed to cover acts of misconduct that are outside the particular subject matter to which Rules 4-8.2(a) and 4-8.4(d) specifically refer, the application of Rule 3-4.3 is excluded. See *Adams v. Culver,* 111 So. 2d 665, 667 (Fla. 1959). By contrast, see The *Florida Bar v. Brake,* 767 So. 2d 1163 (Fla. 2000).

3) By virtue of the particular types of misconduct referenced by the charges related to Rules 4-8.2(a) and 4-8.4(d),

the application of Rule 3-4.3 to the facts alleged is displaced, based upon the doctrines of "ejusdem generis" and "noscitur a sociis", and related canons of construction.

4) The allegations regarding statements by Respondent "concerning the qualifications of the State Attorney's Office" and "concerning the qualifications of the Public Defender's Office", do not constitute violations of either Rules 4-8.2(a) or 4-8.4(d), and are sham.

5) The allegations regarding statements by Respondent "concerning the qualifications or integrity of assigned judges", in sworn motions for disqualification, fail to state a violation of Rule 4-8.2(a).

6) Allegations regarding statements made by Respondent "concerning the qualifications or integrity of assigned judges" in sworn motions for disqualification, which can be tested solely upon the subjective standard of sufficiency, rather than an objective standard of accuracy, do not fall within the coverage of Rule 4-8.2(a).

7) The charge related to Rule 4-8.4(d) fails to allege conduct by Respondent while engaged in the practice of law. See *The Florida Bar v. Brake,* 767 So. 2d 1163, 1167-68 (Fla. 2000).

8) The charge related to Rule 4-8.4(d) fails to allege acts prejudicial to the administration of justice. By contrast, see *The Florida Bar v. Feinberg,* 760 So. 2d 933, 938 (Fla. 2000).

9) The charge related to Rule 4-8.4(d) fails to allege acts whereby Respondent did knowingly or through callous indifference disparage litigants or court personnel by the means proscribed in Rule 4-8.4(d) and the Commentary

thereto. See *The Florida Bar v. Martocci,* 699 So. 2d 1357, 1360 (Fla. 1997).

IV THE PRE-TRIAL PROCEEDINGS WERE FUNDAMENTALLY UNFAIR, IN WHICH THE REFEREE EXHIBITED OVERT BIAS IN FAVOR THE COMPLAINANT AND ABDICATED HER ADJUDICATIVE FUNCTIONS TO COMPLAINANT'S STAFF COUNSEL

A) The Referee Departed from the Essential Requirements of Law in Denying Respondent's Motions to Dismiss and Motions to Strike as Sham Pleading, and by Granting Complainant's Unauthorized Motion to Compel Respondent To Provide Factual Its Staff Counsel With The Basis For Statement's Alleged in Complaint

1) On June 1st 2004, the Referee erred in denying Respondent's motion to dismiss for lack of Forum and/or Subject Matter Jurisdiction and for failure to state a violation upon the charges alleged in the Complaint, by refusing to follow the holdings of this Court in *Sperry,* 140 So. 2d 587 (Fla. 1962); *Brumbaugh,* 355 So. 2d 1186 (Fla. 1978); *Brake,* 767 So. 2d 1163 (Fla. 2003); and by disregarding the unbending standards governing motions for disqualification mandated under Rule 2.160, *Fla. R. Jud. Admin.,* and the precedents of this Court related thereto.

2) On June 3rd, 2004, the Referee erred in denying Respondent's motion to strike for sham pleading, notwithstanding Respondent's unrebutted testimony that: Complainant's staff counsel had knowingly presented a forged and fabricated documented before the grievance committee, that contained purportedly self-incriminating statements by

Respondent, which staff counsel had misrepresented to have obtained from the "State file" in Case No. F-01-3508; that staff had retaliated upon receiving Respondent's letter of February 21st, 2003 demanding that he withdraw the forged and fabricated document by expanding the rule violations he intended to charge, and by scheduling a "PAPER HEARING" so that Respondent could not expose staff counsel as a fabricator and falsifier before the grievance committee; and that staff counsel had relied upon a dismissed Information containing an invalid and false charge, and upon suppressed and tainted information; and did thereby condone staff counsel's subversion of the disciplinary process in order to achieve his contrived and dishonest ends. See *Metropolitan Dade County v. Martinsen,* 736 So. 2d 794, 796 (3rd DCA 1990); *Rosenthal v. Rodriguez,* 750 So. 2d 703, 704 (3rd DCA 2000).

3) By Pre-Trial Order of April 1st, 2004, the designated Referee scheduled this case for calendar call on July 9th, 2004, and for trial during the week of July 19th, 2004, both of which the Referee cancelled in deference to Complainant's motion to require Respondent to provide its staff counsel with the factual basis for the Respondent's statements alleged in the Complaint, which staff counsel submitted under cover letter dated July 1st, 2004, and noticed for hearing on July 14th, 2004.

4) The Referee granted the Complaint's motion for factual basis, purportedly upon the basis of Rule 4-8.2(a), and this Court's decision in the *The Florida Bar v. Ray,* 797 So. 2d 556 (Fla. 2001), despite acknowledging that this motion was unauthorized under any rule of evidence or procedure, and despite recognizing that the decision in *Ray* nowhere approved any such pre-trial motion.

5) The motion was predicated upon misrepresentations of law and fact, to which Respondent addressed in his Response submitted to the Referee on the morning of July 14th, 2004, but which the Referee overlooked or disregarded through the pretense of treating Complainant's Rule 4-8.2 motion as a motion to compel discovery.

6) The Referee improperly relied upon staff counsel's false representation that its Rule 4-8.2(a) motion had been occasioned by Respondent's evasive answers to interrogatories, despite the absence of any interrogatory related to the matters alleged in the Complaint.

7) The Referee permitted the staff counsel to ex parte Respondent in the preparation and submission of [t]he Referee's order granting Complainant's motion, without any directions or clarification regarding its contents, and did thereupon sign this fraudulently procured, ex parte order on July 14th, 2004.

8) The Ex-parte order granting Complainant's Rule 4-8.2(a) motion went well beyond the factual basis for statements alleged in the Complaint that supposedly were subject to Rule 4-8.2(a), to matters never even considered in the *Ray* decision, such as the factual basis for statements concerning the State Attorney's Office and Public Defender's Office; such as the factual basis for the exhibits described in the complaint from which the alleged statements were extracted; and such as the factual basis for charges related to Rules 3-4.3 and 4-8.4(d).

9) The order granting Complaint's Rule 4-8.2(a) motion was signed by the Referee on July 14th, 2004, and by directing Respondent to respond within 20 days, despite the fact the Referee was authorized to defer or reserve ruling upon this matter until the final hearing, pursuant

to Rule 3-7.6(g)(4), the Referee allowed Complainant's staff counsel to use this subterfuge to cancel the trial set for the week of July 19th, 2004.

10) Respondent did thereafter, on August 2nd, 2004, submit a timely response by means of a Verified Motion To Vacate Order Dated July 14th, 2004 that granted Complaint's motion to require factual basis for Rule 4-8.2(a) statements, claiming that: this order was procured through fraud on the Court; was prepared and submitted ex parte; was unsupported by the decision in *The Florida Bar v. Ray,* 797 So. 2d 556 (Fla. 2001); was irrational in its multiplicitous application to the duplicitous form of the single count Complaint; was unauthorized by any rule or law; would compel Respondent's concession to the pre judgment of the issues; would compel Respondent to forfeit his privileges and immunities related to the alleged statements; and entailed an unconstitutional abdication of adjudicative responsibilities by conferring upon Complainant's staff counsel the unlawful prerogative to determine the sufficiency of Respondent's factual basis, for each and every alleged statement.

11) Although Respondent's motion to vacate was in fact properly responsive to the order granting Complainant's motion to require factual basis, the Referee failed to act upon this motion, thereby allowing the initial report period to expire without having conducted the final hearing as directed in this Court's order dated February 2nd, 2004.

12) Pursuant to the Court's Order of reference dated February 2nd, 2004, Eleventh Circuit Judge Margarita Esquiroz was appointed serve as Referee herein.

13) A Case Management Conference was held on April 1st, 2004, whereupon the Referee issued a standard trial setting order with pre-trial instructions of that date.

14) The Referee's pre-trial order set a calendar call for July 9th, 2004, and scheduled the trial for the week of July 19th, 2004, although both were cancelled so that Complainant's staff counsel could be heard on his unauthorized Rule 4-8.2(a) motion, and so that staff counsel and the Referee could coerce Respondent into forfeiting his legal defenses and immunities by means of the unlawful, ex-parte order upon Complainant's Rule 4-8.2(a) motion, dated July 14th, 2004.

15) The pre-trial order of April 1st, 2004 directed the parties to complete all "pre-tr[ia]l motions, depositions . . . discovery matters or proceedings related thereto" at least ten days prior to the start of the trial period, to wit: July 9th, 2004 coinciding with the date of the calendar call.

16) As of July 9th, 2004, both Complainant and Respondent had served their pre-tr[ia]l catalogues, and Respondent had served his answers to Complainant's interrogatories and requests for production.

17) The Referee violated this Court's order of reference when she failed to conduct the final hearing and file her report within 180 days for her appointment, in that no "substantial reason" existed for her to cause this delay.

18) The Complainant's staff counsel and the Referee relied upon Complainant's Rule 4-8.2(a) motion and the ex-parte order thereon to contrive their "reasons requiring delay", by arranging for this hearing on July 14th, 2004, after the July 9th, 2004 pre-trial completion date.

19) On August 11th, 2004, the Referee filed a motion with this Court for an extension of time to submit her Report, that requested an additional sixty (60) day period from the due date of "August 24th, 2004". In her motion, the Referee misrepresented that the "trial of this cause has not begun" upon the pretext that "pre-trial motions have only recently been heard".

20) The only pre-trial motion that had "recently been heard" was the Complainant's unauthorized Rule 4-8.2(a) motion, which should not have been cause for the delay of the trial, without the contrivance of the Referee's July 14th, 2004 order granting same.

21) As a consequence of the Referee's deceptive motion for extension of time, this Court issued an order on August 18th, 2004 that granted an extension to October 22nd, 2004 to file the report.

22) Complainant used this extension period to further coerce and oppress Respondent in connection with the unlawful, ex-parte order granting its Rule 4-8.2(a) motion, by noticing a hearing on its motion to compel compliance for September 29th, 2004, under cover letter dated September 22nd, 2004.

23) This motion to compel gives the appearance of being made in retaliation for a motion for disqualification that Respondent submitted to chambers on September 20th, 2004, alleging the use of the Referee's unlawful, ex-parte order of July 14th, 2004 to contrive the pretext for her deceitful motion for extension of time.

24) The Complainant treated the Referee's order of July 14th, 2004 upon its Rule 4-8.2(a) motion as a discovery order, by moving to compel in reliance on Rule 1.380, *Fla.*

R. Civ. P.; and notwithstanding the pendency of Respondent's motion for disqualification, the Referee permitted Complainant's staff counsel to argue his motion to compel despite Respondent's absence.

25) The Referee did not sign an order denying Respondent's motion for disqualification until after the September 29th, 2004 hearing on Complainant's motion to compel, which order of denial is dated October 4th, 2004.

26) Respondent had every right to expect that the Referee would not proceed with the hearing scheduled for September 29th, 2004 upon Complainant's motion to compel compliance with Rule 4-8.2(a) order of July 14th, 2004, due to the pendency of his motion for disqualification. See *Tableau Fine Art Group, Inc., v. Jacoboni,* 853 So. 2d 299 (Fla. 2003); *Fuster-Escalona v. Wisotsky,* 781 So. 2d 1063 (Fla. 2000); *Shah v. Harding,* 839 So. 2d 265 (3rd DCA 2003).

27) Notwithstanding the mandates of Rule 2.160, Fla. R. Jud. Admin., the Referee capitulated to Complainant's interests by holding an improper, ex-parte hearing on September 29th, 2004, and thereupon issuing her order granting Complainant's motion to compel of said date, whereby Respondent was ordered to "comply with this Court's Order Granting The Florida Bar's Motion to Require Respondent to Provide a Factual Basis for statements subject to Rule 4-8.2 within 10 days of this order."

28) Under threat of sanction arising from this improper, ex-parte order compelling compliance, Respondent served his "Response To Order On Motion To Compel Compliance With Order Related To Rule 4-8.2", on October 9th, 2004.

29) To further threaten Respondent with the prospect of being arbitrarily and unlawfully sanctioned in connection with the Court's order compelling compliance of September 29th, 2004, Complainant's staff counsel copied Respondent with his letter to the Referee, dated October 20th, 2004, in which he enclosed "the original September 29th, 2004 transcript of the motion hearing." The staff counsel's letter falsely represents that the copy was sent to Respondent "(w/enclosure)", leaving him to guess at what the Referee and staff counsel had discussed at this ex-parte meeting that was so important as to have her office contact staff counsel to request the original transcript of the September 29th hearing.

30) The submission of the original transcript to the Referee of the improper hearing of September 29, 2004 was an overt act of ex-parte communication that served to replay and compound the ex-parte discussion between Complainant's staff counsel and the Referee at their meeting on September 29th, 2004.

31) Unable to achieve their collusional goal of coercing Respondent into forfeiting his legal defenses and immunities, when Respondent would not furnish the type of Response that Complainant has sought to compel him to make within the additional sixty (60) day period granted by this Court's Order of August 18th, 2004, the Referee again moved for an additional sixty (60) days from October 22nd, 2004 to submit the report.

32) Once again, the Referee used a pretext to justify her failure to conduct the trial within the extension period, this time by misrepresenting that this case could not be tried "Until after November 5th, 2004", due to "previously

scheduled jury tr[ia]ls as well as conflicts in Bar Counsel's schedule".

33) Given that the Referee had not held a calendar call during the extension period, and given that no notice of conflict or unavailability had been served by Complainant's staff counsel at any time, the Referee's representation to this Court about "conflicts in Bar Counsel's schedule" could have only come from ex-parte contacts, or by a collusional pact between the Referee and staff counsel to mislead this Court into granting an additional extension.

34) On October 27th, 2004, this Court granted an additional sixty (60) day extension to December 27th, 2004 for the Referee to file her report. This order was received by the Respondent several days later, in an envelope post marked October 28th, 2004.

35) During the week of November 1st, 2004 messages were left on the telephone service at Respondent's residence by the Referee's judicial assistant, advising of a trial for Monday, November 8th, 2004. Given the fact that the Referee's motion for extension of time filed on October 25th, 2004 indicates that "it will not be possible to try this case until after [Friday] November 5th, 2004", the selection of a trial the following Monday on November 8th, 2004, was by pre-arrangement between Complainant's staff counsel and the Referee is too transparent to doubt.

36) Although the Referee had accommodated the interests of Complainant's staff counsel by pre-arranging a trial date in secret, without calendar call, this also done without notice of Final Hearing being served upon Respondent in conformity with Rule 3-7.6(h), Rules *Reg. Fla.* Bar.

37) Respondent had submitted and served his Answer on June 23rd, 2004, following the denial of his motions to dismiss and strike, on June 1st and June 3rd, respectively. Thus the Referee and the Complainant's staff counsel were non-complaint with Rule 3-7.6(h) that requires the setting of the case for trial "upon not less than 10 days' notice", which "shall be held as soon as possible following the expiration of 10 days from the filing of the Respondent's answer".

38) The cancellation of the original trial setting upon the pretextual use of the July 14th, 2004 order granting Complainant's Rule 4-8.2(a) motion which enabled the Referee to obtain two extension periods, so that the trial could be pre-arranged on the first "possible" date when the Complainant would be ready, without even providing the required notice under Rule 3-7.6(h) to Respondent, violates due process. See *Keys Citizen For Responsible Government, Inc. V. Florida Keys Aqueduct Authority*, 795 So. 2d 940 (Fla. 2001).

39) Based upon these events, Respondent prepared another motion for disqualification that complained about the lack of Notice required by Rule 3-7.6(h) [in paragraph 17], and had same delivered to the Referee's chambers the morning of November 8th, 2004.

40) In order to prevent an adversarial atmosphere from developing between Respondent and the Referee, it would not have been proper for Respondent to have presented himself before the Referee on the morning of November 8th, 2004. See *Tableau Fine Art Group, Inc. v. Jacoboni*, 853 So. 2d 299 (Fla. 2003); *Rogers v. State*, 630 So. 2d 513 (Fla. 1993).

[41]) Although Respondent was entitled to rely upon his motion for disqualification, and to await his receipt of the order thereon, before having any further interaction with the Referee, as provided by *Tableau* and *Rogers,* above cited, the Referee allowed the Complainant to proceed with the trial in his absence.

C) Respondent Served Three Separate Motions For Disqualification Upon The Referee Subsequent To Her Order Of July 14th, 2004 Based Upon Different Episodes In The Referee's Continuing Pattern Of Unauthorized, Ex-Parte, Collusional, And Dishonest Acts.

1) The Respondent served upon the Referee a verified motion for disqualification on July 26th, 2004, that was denied by order dated August 10th, 2004, as being legally insufficient. This denial was error.

2) The Respondent served upon the Referee a verified renewed motion for disqualification on September 20th, 2004, that was denied by order dated August 4th, 2004. This denial was error.

3) The Referee further erred by holding an ex-parte hearing upon Complainant's motion to compel, on September 29th, 2004, while that motion for disqualification was pending.

4) The Respondent served upon the Referee a verified second renewed motion for disqualification on the morning of November 8th, 2004, which the Referee ignored by proceeding with the trial despite Respondent's absence. This too was error.

D) The Trial Was An Illegal Proceeding That Served As The Mere Pretext For The Fraudulent, Ex-Parte Report, Which Simply Recycled The Sham Allegations Of The Deficient Complaint Verbatim

1) On July 9th, 2004, the pre-tr[ia]l completion date fixed under the Referee's pre-tr[ia]l Order of April 1st, 2004, Respondent submitted and sewed his motion in limine, under cover letter of said date, and noticed same for hearing prior to the trial schedule for the week of July 19th, 2004.

2) The motion in limine was in response to the prospective witnesses listed in the Complainant's pre-trial catalogue consisting of Circuit Judges Maria Espinosa Dennis and Manuel Crespo who had presided in Case No. F-01-3508, and several of the various assistant state attorneys and assistant public defenders whose names appear, even ever so briefly, in the case docket of that case, at different periods during the course of that proceeding.

3) None of the listed assistant state attorneys or public defenders are identified in the Complaint as the object of any offending statement alleged in the Complaint, or the subject of any rule violation charged therein.

4) Nowhere does the Complaint allege objectionable language directed towards the person of any particular assistant state attorney or assistant public defender in support of any specifically charged rule violation.

5) Because the Complaint does not allege conduct by Respondent while engaged in the practice of law, each of the assistant state attorneys and assistant public defenders listed as witness for Complainant would be impertinent and immaterial to the charge related to Rule 4-8.4(d).

6) Because Respondent's acts of self-defense to the prosecution in Case No. F-01-3508 was constitutionally protected conduct, his successful self-presentation in that case could not, as a matter of law, cause prejudice to the administration of justice, thereby making the assistant state attorneys and assistant public defenders listed as witness for Complainant impertinent and immaterial to the charge related to Rule 4-8.4(d).

7) Because no form of prohibited language described in Rule 4-8.4(d), and the Comment thereto, as being prejudicial to the administration of justice, is alleged in the Complaint, the assistant state attorneys and assistant public defenders listed as witnesses for complainant would be impertinent and immaterial to the charge related to Rule 4-8.4(d).

8) Because statements concerning the State Attorney's Office or the Public Defender's Office are not subject to Rule 4-8.2(a), the assistant state attorney's and assistant public defenders listed as witnesses for Complainant would be impertinent and immaterial to the charge related to Rule 4-8.2(a).

9) Because statements concerning the State Attorney's Office or the Public Defender's Office are constitutionally protected speech, the assistant state attorneys and assistant public defenders listed as witnesses for Complainant would be impertinent and immaterial to the charge related to Rule 4-8.2(a).

10) Because Judge Dennis and Judge Crespo are legally precluded from passing upon the accuracy of facts alleged in a sworn motion for disqualification, and attempting to refute same, in accordance with the requirements of *Fla. Stat.* § 38.10 and Rule 2.160, *Fla. R. Jud. Admin,* their

testimony would be impertinent and immaterial to the rule violations charged.

11) Because Judges Dennis And Crespo are legally prohibited, under the subjective sufficiency standard of *Fla. Stat.* § 38.10 and Rule 2.160, *Fla. R. Jud. Admin,* from disputing the Respondent's belief and expressed fears of judicial partiality and prejudice, their testimony would be impertinent and immaterial to the rule violations charged.

12) Because intent is an element for charges concerning dishonesty or deceit, that must be based upon a factual finding that the conduct was deliberate or knowing, the variously named witnesses listed in Complainant's pre-trial catalogue would be incompetent to[ ] testify regarding the veracity of Respondent's mental state in the expression of his beliefs and opinions characterizing judicial partiality or prejudice. See *The Florida Bar v. Barley,* 831 So. 2d 163, 169-70 (Fla. 2002); *The Florida Bar v. Forrester,* 818 So. 2d 477, 483 (Fla. 2002).

13) None of the listed witnesses testified before the grievance committee, and no inquiry complaint, letter complaint or investigatory statement from any witness was ever presented to the grievance committee.

14) No statements from any witness are contained in the file in TFB Case No. 2003-71,056 (11M).

15) No witness statements were made part of the record of investigation provided to Respondent pursuant to Rule 3-7.4(1).

16) No witness statement was relied upon by the grievance committee at the "PAPER HEARING" on March

26th, 2003, and none had been provided to Respondent pursuant to Rule 3-7.4(h).

17) The use of witnesses who played no part in the grievance proceeding, to support the charges voted out of the grievance committee, violates Rule 3-3.2(b); is an unconstitutional exercise of undelegated enforcement authority; and violates substantive and procedural due process.

18) The Referee violated her subject matter jurisdiction by disregarding Respondent's motion in limine, to allow Complainant to present its incompetent, impertinent and immaterial witness testimony.

19) Under cover letter dated November 24th, 2004, The Complainant's staff counsel mailed to the Referee his proposed report, statement of costs and diskette, and requested her to "kindly sign the Report of Referee".

20) No opportunity was afforded Respondent to respond to the proposed findings and conclusions, in violation of Cannon 3(B)(7) of the Florida Code of Judicial Conduct.

21) The proposed Report is nothing more than a verbatim re-statement of the allegations of the Complaint, in a standardized report format.

22) Being a mere recycling of the Complaint, the proposed Report contains the same constitutional infirmities and legal defects that invalidate the Complaint.

23) Being a mere recycling of the Complaint, and being based upon the same illegal, suppressed, immune and constitutionally precluded information that was contained in exhibits to the Complaint, the proposed Report is likewise tainted and vitiated by this information.

24) In abdication of her responsibility under Rule 3-7.6 to render proposed findings of fact and recommendations as to guilt and sanctions, the Referee ultimately signed the proposed Report, without change or modification, and did thereby blindly adopt this ex-parte submission with all the bare conclusionary and sham recitals therein, the factual basis of which had all been derived from allegations taken entirely out of context from documents Respondent had filed in Case No. F-01-3508.

25) The Referee did further blindly adopt all of the ex parte recommendations as to guilt and sanctions, that had been contrived by Complainant's staff counsel without evidentiary support in the record, in violation of judicial Cannon 3(B)(7).

26) The Referee did further violate Judicial Cannon 3(B)(7) and abdicate her responsibility under Rule 3-7.6(k) to prepare the Report, as mandated by her designation pursuant to this Court's order of February 2nd, 2004, by her unconstitutional delegation to Complainant's staff counsel in violation of Rule 3-3.1.

V. THE REPORT LACKS FACTUAL SUPPORT IN THE RECORD, CONTAINS A CLEARLY ERRONEOUS RECOMMENDATION OF GUILT, CONTAINS SANCTIONS UNAUTHORIZED BY LAW, AND SANCTIONS THAT ARE JURISDICTIONALLY VOID AND UNCONSTITUTIONAL

A) No Clear And Convincing Evidence Of Guilt Could Exist Regarding The Veracity of Respondent's Mental Impressions, Beliefs and Opinions.

1) The Report is devoid of any evidentiary support for finding that the allegations which Complainant extracted

from Respondent's filings in Case No. F-01-3508 were both false and made with reckless disregard for truth or falsity.

2) Based upon the naked allegations of the Complaint, as incorporated into the Report, it was clearly erroneous for the Referee to conclude that the mental impressions expressed in Respondents statements were both false and made with reckless disregard for truth.

3) Based upon the naked allegations of the Complaint, as incorporated into the Report, there was an absence of clear and convincing evidence that Respondent's statements of opinion regarding his beliefs and fears of judicial partiality or prejudice were both false and made with reckless disregard for truth. *The Florida Bar v. Martocci,* 699 So. 2d 1337, 1359 (Fla. 1997).

4) Respondent's allegations used to characterize his beliefs, fears, and opinions regarding judicial partiality and prejudice is protected speech that cannot, as a matter of law, support findings that his expressed beliefs, fears, and opinions were both false and made with reckless disregard for the truth.

5) No evidence exists in the described documents to support the conclusions recited in paragraph 10 of the Report that Respondent "repeatedly made outrageous accusations and statements impugning the integrity of judges and other officers of the court".

6) No evidence exists to support the impertinent and immaterial recitals in paragraphs 11, and the sham allegation that Respondent "failed to provide a sufficient explanation for his failure to attend said hearings [of September 29th, 2004 and November 8th, 2004", given the

pendency of Respondent's renewed motions for disqualifications.

7) No evidence exists to support the sham allegations of paragraph 12 that Respondent failed to provide evidence to support his filings that "attacked the credibility of this Referee and Bar Counsel"; and the Referee's act of including this fraudulent allegation in her Report serves as proof that Respondent's accusations have merit.

8) An absence of substantial competent evidence to support a violation of Rule 3-4.3 is shown on the face of the Report.

9) An absence of substantial competent evidence to support a violation of Rule 4-8.4(d) is shown on the face of the Report.

10) The conclusion that Respondent violated Rule 3-4.3 is clearly erroneous and lacks support in the record.

11) The conclusion that Respondent violated Rule 4-8.2(a) with respect to statements concerning the State Attorney's Office and the Public Defender's Office is clearly erroneous and lacks support in the record.

12) The conclusion that Respondent violated Rule 4-8.4(d) is clearly erroneous and lacks support in the record.

13) The conclusion that Respondent violated Rule 4-8.2(a) by knowingly making false statements attacking the integrity of judges and prosecuting attorneys, in sworn motions filed in a State prosecution, constitutes fundamental error, given the absence of any charges of perjury or criminal contempt ever resulting therefrom.

B) None Of The Cases Cited In The Report Support A Finding of Guilt Upon These Facts And There Is No Precedent For This Case

1) The decision in *Ray*, 797 So. 2d 556 (Fla. 2001) does not support the findings of guilt in that: Respondent was not acting on behalf of a client; Respondent did not publish a statement outside of a judicial proceeding that impugned the qualifications or integrity of any judge; the Respondent's allegations of unfairness and partiality are protected speech, authorized by Fla. Stat. § 38.10 and Rule 2.160, *Fla. R. Jud. Admin.*; Respondent's allegations of unfairness and partiality were made in his defense of a false charge that arose from an illegal arrest and is therefore subject to his litigative immunity.

2) The decision in *Tindell*, 550 So. 2d 449 (Fla. 1989) involved federal racketeering complaints in which the attorney accused the state judge, of accepting bribes related to an unfavorable ruling, and in which the attorney admitted having no evidence of improper activity by the state judge in the federal action.

3) The decision in *Weinberger*, 528 So. 2d 661 (Fla. 1981) involved an attorney who "filed various pleadings and made public statements denigrating the Court's and administration of justice", after suffering adverse rulings in employment termination cases.

4) The decision in *Clark*, 528 So. 2d 369 (Fla. 1988) also involved a federal action in which the attorney accused a state judge of being an active participant in a RICO conspiracy, related to adverse rulings by the state judge, and in which the attorney initiated appeals in the Federal Courts that were found by the United States Supreme Court to be "utterly frivolous".

5) The accusations alleged in the Complaint, and incorporated into the Report, do not impugn the personal or moral integrity of anyone; moreover, the accusations of unfairness were made to the judge in question, not about him or her; and were not in reaction to an unfavorable ruling, but over the failure to abide by the rule of law.

C) The Recommendations Regarding Disciplinary Measures Are Clearly Erroneous, Without Factual Basis And Involve Aggravation Upon An Uncharged Rule Violation.

1) No facts exist to show that Respondent failed to comply with any Court Order or Rule, so as to cause interference with a legal proceeding, making an aggravation upon sanction standard 6.23 clearly erroneous.

2) No facts exist to show a pattern of misconduct, making Respondent's aggravation upon sanction Standard 9.22(c) clearly erroneous, especially since this is a duplicitous, single count complaint.

3) No facts exist to show bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules of orders of the disciplinary agency, making Respondent's aggravation upon sanction Standard 9.22(e) clearly erroneous.

4) Aggravation upon the grounds of Standard 6.23, 9.22(c) and 9.22(e) involve matters not charged in the Complaint that cannot be considered. See *In Re Ruffalo,* 390 U.S. 544 (1968); *The Florida Bar v. Price,* 478 So. 2d 812 (Fla. 1985).

D) The Cost Award Lacks Authentication In The Record, And Involved An Unlawful And/Or Retroactive Assessment Of An Administrative Penalty.

1) The Referee abused her discretion in adopting the Complainant's Cost Statement that was never authenticated, and without any determination as to whether the costs were unnecessary or excessive, and without affording Respondent the opportunity to question same.

2) The Referee assessed an unconstitutional administrative penalty in violation of Article I, Sections 6, 18 and 21 of the Florida Constitution.

3) The assessed administrative penalty of $1,250.00 involved the unconstitutional retroactive application of an increased penalty in the sum of $500.00, upon a disciplinary complaint filed in January, 2004, prior to the Court's approval of this increase, on May 20th, 2004. See *R. A. M. Of South Florida, Inc.* 869 So. 2d 1210 1216-17 (2nd DCA 2004.)

4) The imposition of the Bar sponsored administrative fee, in addition to an award of costs in favor of The Florida Bar, invited vexatious disciplinary action here as a means for this professional association to extract an unauthorized and/or unlawful added membership assessment against Respondent in violation of Article II, Section 3; Article 5, Section 14; and Article 7, Section I, of Florida's Constitution.

5) The allowance of costs to The Florida Bar, regardless of whether the Bar is successful in whole or in part, is contrary to the prevailing party rule of *Fla. Stat.* § 57.041, and the "improper purpose" standard of *Fla. Stat.*

§ 120.595(1), thereby denying Respondent substantive due process and equal protection of law.

6) The creation of a new category of Delinquent Members, pursuant to the Amendment To [Rule 1-3.6] Rules Regulating Florida Bar, 875 So. 2d 448, 449, 459 (May 20th, 2004) for non-payment of costs awarded by a Referee, including the administrative fee, invited unnecessary and excessive costs here as a means to extract an added membership assessment against Respondent, by coercive and illegal means, in violation of Article I, Sections 2, 6, 9, 18, and 21 of Florida's Constitution; and Article II, Section 3; Article 5, Section 14; and Article 7, Section I, of Florida's Constitution.

E) The Referee's Special Condition That Would Require Respondent To Submit To A Comprehensive Mental Health Evaluation Through Florida Lawyers Assistance Is Unauthorized And Unconstitutional.

1) The Referee exceeded her jurisdiction in recommending a comprehensive mental health examination through FLA, in that no authority exists anywhere in the Rules Regulating The Florida Bar for the imposition of this special condition for a public reprimand.

2) This imposition violates Respondent's right of privacy guaranteed by Article I, Section 23 of the Florida Constitution. See *City Of North Miami v. Kurtz*, 633 So. 2d 1025 (Fla. 1995).

3) This imposition violates Respondent's penumbral privacy rights under the 1st, 4th and 5th Amendments to the United States Constitution, along with Respondent's

right to substantive due process and equal protection under the 14th Amendment.

4) The Referee's adoption of the Complainant's proposal that imposes as the special condition of the recommended public reprimand the requirement that Respondent submit to a comprehensive psychological evaluation by FLA, and compels him to be made subject to FLA's treatment program, upon pain of indefinite suspension, constitutes a jurisdictionally and constitutionally void infringement upon Respondent's liberty interests, without even the pretense of color of law.

5) The Referee's adoption of the Complainant's proposal that imposes as the special condition of the recommended public reprimand the requirement that Respondent submit to a comprehensive psychological evaluation by FLA, and compels him to be made subject to FLA's treatment program, upon pain of indefinite suspension, whereby his constitutional rights of confidentiality and privacy, and of testimonial privilege, would be waived, violates Respondent's protections under the 4th, 5th, and 14th Amendments to the Constitution of the United States, in that the information thereby obtained from Respondent would become available for use "in evidence in disciplinary proceedings under these rules", pursuant to Rule 3-7.1(o), Rules *Reg. Fla.* Bar.

6) The Referee's adoption of The Complainant's proposal that imposes as the special condition of the recommended public reprimand the requirement that Respondent submit to a comprehensive psychological evaluation by FLA, and compels him to be made subject to FLA's treatment program, upon pain of indefinite suspension, whereby his constitutional rights of confidentiality and privacy, and of

testimonial privilege would be waived pursuant to Rule 3-7.1(o), and thereby become available for use in a proceeding to classify him as an "inactive member", pursuant to Rule 3-7.1(a), Rules *Reg. Fla.* Bar, constitutes a jurisdictionally and constitutionally void infringement upon Respondent's interests in his professional status, without even the pretense of color of law.

7) The Referee's adoption of the Complainant's proposal that imposes as a special condition of the recommended public reprimand the requirement that Respondent submit to a comprehensive psychological evaluation by FLA, and compels him to be made subject to FLA's treatment program, upon pain of indefinite suspension, without any factual support anywhere in the record for this special condition, and without any rational basis to justify this regulatory imposition, would have the effect of reclassifying Respondent from an active member in good standing, into an inactive status, by unauthorized means that circumvent the procedural requirements of Rule 3-7.13(a), thereby causing this regulatory imposition to resemble a bill of attainder, in violation of Article 1, Section 10, Florida's Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Amended Petition For Review was served by mail this 2nd day of March, 2005 upon:

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APPENDIX N

SUPREME COURT OF FLORIDA

CASE NO.: SC04-87

THE FLORIDA BAR,
Complainant,

[Lower Tribunal Case: TFB File No. 2003-71,056 (11M)]

vs.

MILES J. GOPMAN,
Respondent,

FBN: 226920

_____/

APPELLANT'S AMENDED INITIAL BRIEF

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* * *

Respondent would also call attention to his Response to The Bar's Request For Admission, filed and docketed on February 27, 2004. (Index Doc. "7"). In response to Request For Admission No. 2, he states:

> "2) Admit that the State Attorney's Office purported to charge Respondent with 'No Harm Neglect' in alleged violation of F.S. 825.102(3)(c). Denies that a charge was filed against Respondent in Case No. F-01-003508. Denies that the charging document was a true Information. Denies that the charge as alleged is a true charge. Denies that the allegations contained in the charging document constitute an offense under Florida law applicable to Respondent. Denies that the charge as alleged meets constitutional standards of due process. Also, the charge as alleged, and the underlying allegations of the arrest report lack probable cause for the alleged charge, and show further that Respondent was immune from arrest and prosecution under F.S. 825.105. In addition, the charging document arose from an illegal arrest, and violated Respondent's privileges and immunities under the United States Constitution, under the Florida Constitution, and under Florida law. In addition, the charging document contains wrongfully consolidated charges, improperly joined charges, and is the product of a false and/or forged oath and certification. For all these reasons, the charging document was a void, invalid, defective and sham instrument."

Most of these assertions are relevant to Parts II(A), III(D), IV(A) and V(A) of Respondent's Amended Petition For Review. More significantly, they have been substantiated in Respondent's Appendix Of Documents (Exhibits *"1"-"27"*, and *"51-54"*).

B) From 1/21/004 through 8/16/2004.

1) Motion Hearing Of 6/1/04 Upon Respondent's Motion To Dismiss For Forum And Subject Matter Jurisdiction, etc.

The events of this hearing are described at ¶¶ 8-9, on page 6 of Respondent's Motion To Prohibit To Prohibit And Declare Void, Etc., filed May 3rd, 2005. They are more fully discussed in his Petition And Vacate, Etc., filed on May 20th, 2005 (Introduction: pg. *3*, ¶ 3; Count 1: pg. *6*, ¶ 10; Count II: pgs. *29-30*, ¶¶ 73-75; and Count IV: pgs. *47-50*, ¶¶ 118-126.) In short, the Referee circumvented the holding of *Brake*, 767 So. 2d 1163 (Fla. 2003), by making pro se motions for disqualification filed in defense of a criminal prosecution subject to Bar regulation pursuant to Rule 3-4.3, *R. Reg. Fla. Bar.*

2) Motion Hearing Of 6/3/04 Upon Respondent's Motion To Dismiss As Sham Pleading, etc.

The events of this hearing are described in Respondent's Petition To Declare Disciplinary Proceedings Void, Etc., filed May 5th, 2005 (Count I: pg. *2*, ¶ 2; Count II: pgs. *13-17*, ¶¶ 28-44; pgs. *20-22*, ¶¶ 59-66). They are also discussed in the motion of May 20th, 2005 (Count I: pg. *6*, ¶ 10; and Count IV" pgs. *50-53*, ¶¶ 127-133). In essence, the Referee disregarded Rules 3-3.2(b) and 3-7.6(b), *Rules Reg. Fla. Bar*, by exonerating Bar Counsel's fraud and illegality before the grievance committee, and thereby endorsed the prejudicial taint this imparted to the ultimate allegations of the complaint, again in reliance on Rule 3-4.3.

3) Pretrial submissions

a) Pleadings And Defense.

The Bar's complaint contains thirteen paragraphs, and was accompanied by nine (9) exhibits (*"A"-"I"*). (See Index of Documents, Exhibit *"2"*: *"2(A), 2(I)"*). Paragraph 2 refers to the Information in Case F-01-003508. Paragraph 3 alleges that in this criminal case, Respondent filed documents that:

> "included statements that Respondent knew or should have known were false or . . . made with reckless disregard as to their truth of falsity concerning the qualification or integrity of assigned judges, the State Attorney's Office, and the Public Defender's Office"

Paragraph 3 does not identify which filings contain those statements or what statements are embraced by paragraph 3.

Paragraph 4 refers to a motion to disqualify Judge Maria Espinosa Dennis filed on April 9th, 2001. Paragraph 5 presents fragmented or isolated passages that had been excerpted wholly out of context from this motion for disqualification, in subparagraphs (A) through (E). In none of these excerpts is the term "conspiracy" used. Paragraph 5(C) does refer to a "corrupt charge", and paragraph 5(D) refers to Respondent's claim that "the Court is an active participant in this corruption", without surrounding context describing what was meant.

Paragraph 6 shows that the facts alleged were sworn and verified by Respondent to be "true and correct" and made in "good faith". Paragraph 7 states only that Judge Dennis recused herself on April 25th, 2001, without

referring to any remarks made in her recusal order, or even listing that order as an exhibit to the complaint.

Paragraph 8 of the complaint refers to a motion for disqualification filed on May 8, 2001 before Judge Manuel A. Crespo. Excerpted fragments are presented in subparagraphs 10(A)-10(G). Again, the term "conspiracy" nowhere appears in these isolated passages. Also, these excerpts only refer to the "**corrupt** and manipulative acts and procedures hereinabove described by the State Attorney's Office and Judge Dennis", as alleged in 10(E). Paragraph 10(F) presents an isolated extract about Judge Dennis having " . . . conducted herself **in this case in a dishonest and corrupt manner**, to facilitate and camouflage the illegal acts of the State Attorney's Office . . . ".

Paragraph 10(B) refers to an allegation that "Judge Dennis was directly **implicated in the corrupt prosecutorial conduct by the State Attorney's Office** in bringing the charges contained in the Information". Paragraph 10(A) refers to "a corrupt act" and "[public] corruption" by the State Attorney's Office.

Paragraph 9 refers to Respondent's cover letter to his motion for disqualification before Judge Crespo, advising that the motion was being brought on theory of transfer prejudice from Judge Dennis. None of the excerpts in subparagraphs 9(A) and 9(B) use the term "conspiracy" or the term "corrupt".

Paragraph 11 refers to letters written to Judge Crespo on October 17, 2001 and October 24, 2001 as a composite Exhibit ("D") to the complaint, which presents fragmented passages in subparagraphs 11(A) and 11(B), without identifying from which of these letters either excerpt was taken. Subparagraph (A) contains no mention of "conspiracy" or

"corruption". However, the term "conspiracy" does arise of sorts in subparagraph 11(B) in the suggestion that "the Court's very active role in encouraging me to provide an immunized proffer was merely a ruse towards some entrapment plot . . . **making this court an active co-conspirator in the State's criminal violation** . . . ". The factual basis for this accusation is contained in Respondent's Appendix Of Documents (Exs. *"42"*, *"43"*, *"44"*, *"45"* *"46"*, and *"47"*); and his discussion related to Judge Crespo's participation in the violation of his *Kastigar* immunity (Motion: 5/3/05; pgs. *7-9*, ¶¶ 10-15; pgs. *10-12*; pgs. *10-12*; ¶¶ 18-20).

Paragraph 12 alleges that Respondent filed "numerous-other pleadings and documents" in which "outrageous accusations and statements impugning the integrity of judges and other officers of the court", but without describing any of these "outrageous accusations" or in what document any such statement can be found. The complaint simply gives a "sampling of the other filings". Subparagraphs (A) and (B) mention letters to Public Defender Bennett Brummer and to Judge Dennis, both dated March 26, 2001. Subparagraph (C) refers to a supplemental motion to disqualify Judge Dennis, filed on "April 10, 2001", though the Exhibit ("G") reference indicates this was filed on April 19, 2001, instead. Subparagraphs 12(D) and 12(E) merely refer to Appendixes I & IV to Respondent's interlocutory appeal, filed on July 3, 2001 in Third DCA Case 3D-01-1754.

Paragraph 13 alleges the misconduct charged for violating Rules 3-4.3, 4-8.2(a) and 4-8.4(d). No allegations of misconduct related to Rule 3-4.3 or Rule 4-8.4(d) for "conduct in connection with the practice of law that is prejudicial to the administration of justice" are particularized or even

identified in the complaint. As such, those charges travel upon the same allegations of misconduct that are charged in relation to Rule 4-8.2(a), thereby making the complaint duplicitous.

Respondent's Answer And Affirmative Defenses was served on June 23, 2004 (Index Doc. *"18"*). Defenses (A)1 to (A)11 on pages 2-4 of Respondent's Answer are directed to Rule 3-4.3, averring its inapplicability and displacement by the more specific violations charged under Rules 4-8.2(a) and 4-8.4(d); its invalidity to court related conduct, especially when no sanction was visited nor even threatened by the presiding judge; and its unconstitutional usage to the speech specific allegations of misconduct related to self-representation.

* * *

e) Issue Of Discipline.

The Bar claimed that it had no concern whatsoever about the criminal charge; its only concern is over Respondent's "reactions" in the criminal prosecution and the things he was saying. (T.: 11/08/04; pg. *18*, *l.* 1-7). It was Bar Counsel's contention that Respondent had alleged that "all the different cogs in the system, the State Attorney's Office, the Public Defender's Office, the judge were . . . *basically* . . . in a conspiracy against him" (Ibid: pg. *19*, *l.* 7-15). Although the proof of these allegations was never shown *actually* as opposed to *basically,* this contention was "the basis for the whole Bar proceeding". (Ibid: *l.* 16-17).

Based upon this contention, Bar Counsel would ask for "a public reprimand consistent with the case law" (Ibid, pg. *20*). In addition, out of thin air, Bar Counsel advised that The Bar wanted Respondent evaluated by Florida

Lawyers Assistance, Inc., "because we have serious concerns whether or not he is able to practice law at this time *based on his actions*". (Ibid: pg. *21*, *l.* 4-10).

Still, after all was said and done, Bar Counsel had to concede that the grievance committee did not charge Respondent with "being dishonest" or making "false statements" (Ibid: pg. *151*, *l.* 5-7). As such, the focus was more "based on his mental condition", in making statements "with a reckless disregard for truth". (Ibid: *l.* 14-20). Consequently, the Referee wondered why The Bar was not "going for an admonishment" (Ibid, pg. *154*, *l.* 24-25). Indeed, she noted from the decision in *Ray, supra,* that the conduct under discussion there had only started as "a complaint for minor misconduct . . . period". (Ibid: pg. 166, *l.* 6-8).

This required The Bar to rely upon inapplicable aggravators to take the case out of minor misconduct as defined in Rule 3-5.1(b), Rules *Reg. Fla Bar.* The prejudice to Respondent by the wrongful application of aggravators is as patent as this error is plain, since Respondent would have been entitled to diversion pursuant to Rule 3-5.3(h)(2) otherwise.

Of course, diversion was never an option for The Bar, because the thrust of this proceeding was to institute "a comprehensive mental health evaluation to determine what his status is at this time and is he able to practice law" (Ibid: pg. *170*, *l.* 11-25). Thus, this circumvention of Rule 3-7.13(a) – Incapacity Not Related To Misconduct, required Bar Counsel to allege uncharged misconduct covered by Rule 4-3.5(c) – Disruption of Tribunal, in order to fabricate aggravators related to Sanction Standards 6.23, 9.22(c) and 9.22(e), based upon that uncharged misconduct,

and about which no competent evidence was shown. (Ibid pgs. *155, l.* 19-22; *156, l.* 1-17).

3) Referee's Report.

After The Bar rested on page 123 of the transcript of November 8, 2004, the Referee and Bar counsel spen[t] the next fifty (50) pages in ex parte discussions about the case. In fact, approximately 85 of the 174 transcribed pages are comprised of their discussions. Their discussions directed to proving of the misconduct related to the rule violations in question, and the recommended sanctions are covered from pages *133-174.* As a prelude to this discussion, Bar counsel advanced two arguments one related to the evidence; and the other related to the scope of Rule 3-4.3 (Ibid: pgs. *130* & *132*).

Regarding the evidence, Bar Counsel relied on the Rule 4-8.2 orders to claim that Respondent "in essence" has –

> "not provided anything I have seen to justify any statements he has ever made in different courts regarding the prosecutors . . . the public defenders or the individual judges . . . "
>
> " . . . this Court has asked him to give a factual basis, and, in essence, we still have not seen one . . . "

(Ibid: pg. *130, l.* 13-24).

Regarding Rule 3-4.3, Bar counsel contended this applies to "actions to prejudice the court system" by numerous and "baseless filings" containing accusations against the public defenders, and case filing prosecutors. (Ibid: pgs. *132-133*). If these misrepresentations were not "baseless" enough, Bar counsel goes on to fantasize about

delays to the dockets of Judges Dennis and Crespo (Ibid: pg. *133*). This reliance on Rule 3-4.3 apparently persuaded the Referee that it applies to "any misconduct" such as being "disruptive". (Ibid: pg. *134, n*10-16).

Still, the only rule violation the Referee felt sure about was Rule 4-8.2(a), based upon the decision in *Ray, supra.* (Ibid: pgs. *165-166*; *173-174*). Only as to Rule 4-8.2(a) does she conclude there is "clear and convincing evidence of Respondent . . . demeaning qualifications and integrity of judges . . . " (Ibid: *171, n* 5-10). But the Referee had a "problem" with the "overlapping" nature of the charges involving Rules 3-4.3 and 4-8.4(d). (Ibid: *n* 12-14). In the end, however, she concludes that those rules were also violated because Rule 3-4.3 covers conduct "whether or not you are in court arguing as a lawyer", since it would even apply "to somebody who is out there jogging" (Ibid: pgs. *172, n* 1-5; *173, n* 1-7).

The Referee then instructs Bar counsel to prepare her Report – "a simple report", and to submit it by November 22nd. (Ibid: *174, n* 7-17, 19-24). Bar Counsel complied by cover letter dated November 24th. (Index Doc. *"48"*). The Referee's abdication of delegated adjudicative authority in authorizing the wholesale ex parte preparation and submission of this Report is discussed elsewhere. (Motion: 5/20/05; pgs. *46-55*).

* * *

VI CONCLUSION

This case revolves around the construction and coverage of Rule 3-4.3. Bar counsel and the Referee have offered tell-tale insight into the plasticity of usages to which this rule can be made to order in furthering The

Bar's agenda. Thus, relying upon the open-ended and indefinite template of terms comprising Rules 3-4.3, they turned it into jurisdictional extender of global range, applicable to a lawyer whether in court or out, whether acting in a professional capacity or not, whether at work or at home, or anywhere else. Upon this interpretation, they also used Rule 3-4.3 substantively, to cover "any misconduct" by a lawyer while doing anything at all. To this end, The Bar claims the prerogative to define "misconduct" tatutologically, to cover any behavior it believes should be sanctioned, by any lawyer it believes deserves to be sanctioned, whether the lawyer is "in a restaurant", or "driving a car", or "on a golf course", or just "out there jogging".

As such, Rule 3-4.3 has been used both to facilitate the application of Rules 4-8.2(a) and 4-8.4(d) beyond their operative reach and effect, and as a supplement for their textual limitations in denoting misconduct upon the facts of this case. Beyond this, they raised Rule 3-4.3 to a super constitutional status, using it to neutralize any protection, privilege or guarantee to which Respondent is entitled under the United States and Florida Constitutions.

Lastly, they used Rule 3-4.3 as a disciplinary reinforcing agent, to compound the charges and to enhance the sanctions. In this regard, the rule became their pretext for introducing aggravation allegations of interference and multiple offenses that would not otherwise have had even a colorable basis in law or fact. Yet, absent this pretextual aggravation, no sanction standard can be invoked to support the recommended discipline.

The fact that the charges in this ease originated with The Florida Bar makes its reliance on Rule 3-4.3 all the more dubious and self-serving. Still, governed by the legal

standards of *Fla. Stat.* § 120.52(8), applicable to every other enforcement agency in this State, this rule would surely fail as an "invalid exercise of delegated legislative authority" – especially in relation to subsections (8)(d) and (8)(e) – for being "vague", lacking "adequate standards", vesting "unbridled discretion", or being "arbitrary" and/or "capricious".

Although not applicable to the Rules Regulating The Florida Bar, Section 120.52(8) expresses the absence of any compelling State interest to justify the form of open ended and indefinite professional regulation epitomized by Rule 3-4.3. It demonstrates why the Referee's interpretation and reliance upon Rule 3-4.3 as a jurisdictional override for constitutional guarantees, privileges and immunities cannot withstand strict scrutiny analysis. It shows why the Referee's Report is founded upon fundamental error.

VII CERTIFICATE OF COMPLIANCE

I Hereby Certify that this computer generated brief is typed in font size Times New Roman 14.

/s/ Miles J. Gopman
Miles J. Gopman, Esq.
F B N: 0226920

VIII CERTIFICATE OF SERVICE

I Hereby Certify that a true and correct copy of the foregoing brief was served by U.S. Mail upon William Mulligan, Assistant Staff Counsel, at 444 Brickell Avenue, Suite -100, Miami Florida 33131; and upon John A. Boggs,

chief staff counsel, at 651 East Jefferson Street, Tallahassee, Florida 32399, this 23rd day of August, 2005.

/s/ Miles J. Gopman
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APPENDIX O

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant,	SUPREME COURT CASE NO.: SC 04-87
V.	The Florida Bar
MILES J. GOPMAN, Respondent. /	File No.: 2003-71, 056 (11M) FNB: 0226920

RESPONDENT'S MOTION FOR REHEARING AND CLARIFICATION UPON DISPOSITION ORDER DATED OCTOBER 18th, 2005

COMES NOW, Respondent, MILES J. GOPMAN, appearing pro se, and pursuant to Article V, Section 15, Florida Constitution, Rule 3-7.7(a), *R. Reg. Fla. Bar,* and Rule 9.330(a), *Fla. R. App. P.*, moves for rehearing and clarification upon this Court's Disposition Order dated October 18th, 2005, and as grounds herefore, states:

I. INTRODUCTION

1) On October 18th, 2005, this Court issued its Disposition in the above styled cause, whereby this Court granted The Florida Bar's motion to dismiss the petition for review, and did thereby strike Respondent's initial brief and amended initial brief, filed on August 11th, 2005, and August 24th, 2005, respectively. Notwithstanding that action, this Court did "review the proceedings before the referee" in order to "approve the referee's report, as modified herein", and to "reprimand respondent". Based upon the Court's action

[in] approving the referee's report, the Court denied all of Respondent's "remaining outstanding motions and petitions".

2) Respondent will contend that no sufficient ground exists for so drastic a measure as dismissing Respondent's petition for review, and to thereby deprive Respondent of his substantive right of review of the referee's report upon the issues raised in his petition for review. Although the Disposition order mentions "respondent's violations of the rules governing these review proceedings and violations of court orders", the order is inconclusive in this regard in that no rule violations are described, and no violated court orders are shown.

3) For this reason, Respondent will show that he violated no rules or court orders related to his petition for review, so that the Disposition Order must have resulted from the Court's misapprehension of the record. Had there been any such violation, however, it was technical, inadvertent and corrected, and clearly not sufficiently serious to have justified so harsh a sanction. Lastly, even if the violation had not been remedied, then pursuant to the rules of this Court, Respondent was entitled to notice and an opportunity to correct before entry of the Disposition Order.

4) In addition, the Court overlooked the fact that The Florida Bar's motion to dismiss raised no objection to the filing of Respondent's petition for review or amended petition for review, or to the requirements related to those filings. Its sole objection was to the timeliness of Respondent's initial brief, which as noted in the Disposition order, Respondent had filed over two months prior to the Disposition order. Thus, Respondent will maintain that the Court misapprehended "the rules governing these review proceedings" by dismissing Respondent's petition for review

for reasons unrelated to that filing, and nowhere appearing in the record. In this regard, the only grounds appearing in Rule 3-7.7 that can justify the dismissal of a petition for review is found in subsection (c)(2) related to the "Record on Review" stating inter alia:

> ". . .The party seeking review shall be responsible for, and pay directly to the court reporter, the cost of preparation of transcripts. ***Failure to timely file and serve all such transcripts may be cause for dismissal of the party's petition for review".***

Thus, as the record will attest, the Court overlooked the fact that Respondent had fully complied with this requirement.

5) As indicated by the Disposition Order, the Court relied upon this groundless dismissal of Respondent's petition for review as its grounds for also striking his initial Brief, and for then approving the Referee's Report. Yet, as Respondent will further show, the filing of his petition for review is the jurisdictional filing that, pursuant to Rules 3-7.7(a)(1) and (c)(1), entitles Respondent to review in this Court upon his claims of error raised in his petition for review while the filings of his initial brief is not. Moreover, despite the supposed late filing of Respondent's initial Brief, the Court also overlooked the fact that Respondent's Brief was subject to the time tolling provisions of Rules 9.300(a)-(d), and had been delayed due unanticipated exceptional circumstances beyond Respondent's control.

6) The record will further show that Respondent fully complied with each and every one of "the rules governing these review proceedings" as specified under Rule 3-7.7, over two months prior to the October 18th, Disposition Order. By contrast, The Florida Bar

filed no cross petition for review; filed no Answer Brief; and failed to respond, deny or refute the claims of illegality and constitutional invalidity documented in Respondent's "outstanding motions and petitions". As such, the effect of the Court's Disposition Order was to relieve The Florida Bar of the task of defending against Respondent's multiple claims of legal error, and to thereby deprive Respondent of his right to have this Court reach a determination on the merits of his claims of error.

7) Thus, Respondent will contend that this Court overlooked the standard contained in Rule 3-7.7(c)(5) that: "Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is ***erroneous, unlawful or unjustified"***; and further overlooked the constitutional, jurisdictional and legal challenges raised in Respondent's petition for review, and his "outstanding motions and petitions" that met that burden. In doing so, the Court also overlooked the fact, documented by Respondent in his filings before this Court, that the referee's report that was approved within its Disposition Order is what the Respondent contends is the tainted product of fraudulent, collusive, illegal and unconstitutional proceedings.

8) In this connection, Respondent will contend that the Court's approval was unauthorized and predicated upon a misapprehension of its constitutional responsibility conferred by Article 5; Section 15. As such, once Respondent had properly invoked the Court's jurisdiction to review the merits of his claims of error, this Court could not then divest itself of this constitutional responsibility, and thereby foreclose Respondent from his entitlement to this review.

9) The consequence of this abdication of constitutional responsibility is to surrender to The Florida

Bar and the referee the Court's exclusive, sovereign power to regulate the practice of law, and in this particular instance, to determine whether the conduct upon which Respondent is being reprimanded falls within the court's regulatory jurisdiction. Thus, as Respondent will contend, the approval of the referee's report, even as modified in the Disposition Order, constitutes a punitive measure, visited in violation of procedural and substantive due process. In short, that approval represents a Bill Of Attainder.

10) In fact, this Court did recognize the report to be facially defective by its substitution of modifying language. However, the Court overlooked the fact that the report merely restates verbatim the allegations of the complaint, and that the allegations of misconduct do not state the elements needed to support any rule violation charged, as textually defined and elucidated in the Comments.

11) Although this Court does not mention any specific rule that Respondent had reportedly violated, no cited decision supports a finding of speech related misconduct upon the conduct alleged in the complaint. In this regard, the Court misapprehended that misconduct herein alleged involved Respondent's successful pro se defense of a wrongful prosecution.

12) To this end, Respondent will show that at all times Respondent was exercising his constitutionally protected right of self-defense, protected under the First and Sixth Amendments to the United States Constitution, in order to vindicate the State's violations of his constitutional guarantees under the Fourth, Fifth and Fourteenth Amendments to the United States Constitutions. Thus the Court further misapprehended that under the governing rules and controlling precedents of this Court, Respondent's reported conduct was privileged and proper, and does

not constitute the practice of law, and therefore violated no disciplinary rule.

13) The Court also overlooked the fact that paragraphs 11 and 12 of the report concern matters uncharged in the complaint, and for which Respondent received no notice prior to their inclusion in the report. Although Respondent had never been afforded an opportunity to deny and dispute those uncharged and unnoticed allegations, they would not constitute grounds for discipline even if true. As reflected by the transcripts and record before this Court, the referee made no findings related to the matters alleged in paragraphs 11 and 12, and, in fact, the transcripts and record demonstrate the falsity of those allegations in all material respects.

14) The Court further overlooked the facial defects in the report concerning the uncharged and unnoticed sanction standards cited in the report. The Court failed to apprehended that the complaint co tains no allegations related to "Abuse of the legal Process" within the contemplation of Sanction Standard 6.23, and none were proven. The Court further misapprehended that no grounds for aggravation were alleged or shown related to "bad faith obstruction of disciplinary proceeding, etc.", within the contemplation of Sanction Standard 9.22(e).

15) With respect[] to the misstatements contained in paragraphs 11 and 12 of the report, and the overlooked mis-reliance on Sanction Standards 6.23 and 9.22(e), the Court has overlooked the established constitutional-doctrine that bars the use of unnoticed and unalleged charges of misconduct to impose discipline, as this violates basic procedural due process. For this reason, the Court has misapprehended its jurisdiction to approve a false report, that is constitutionally infirm.

16) The Court further misapprehended its jurisdiction to place Respondent "on probation for one year and indefinitely thereafter until further order of the Court". As Respondent, will maintain, because no probationary period was recommended by the referee, and none was sought by The Florida Bar, the Court was required to justify the enhancement of the disciplinary measures in the record of this case. In this regard, Respondent will show the absence of competent substantial evidence or legal grounds to support this unprecedented probationary reprimand.

17) In addition, Respondent seeks clarification as to the meaning and purpose of the one year probationary period to be followed by an indefinite period that will not expire "until further order of this Court", what is required of Respondent during this indefinite period, and as to what will be the occasion for its termination "upon further order of the Court".

18) Respondent will maintain that the modification to paragraph IV D(1), in striking the language related to "an immediate and indefinite suspension", did not go far enough in that no competent substantial evidence or legal basis exists in the record to support the referee's recommendation that Respondent "submit to a comprehensive mental health evaluation conducted by a mental health practitioner approved by Florida Lawyer's Assistance, Inc." In this regard, once again, the Court overlooked the fact that the reported misconduct involved protected speech, unrelated to the practice of law, and therefore misapprehended its regulatory jurisdiction to compel compliance with this patent infringement upon Respondent's fundamental right of privacy, guaranteed by Article I, Section 23, Florida Constitution, especially in the absence of the showing of a compelling state interest.

19) The Court further misapprehends that its implicit threat to subject Respondent to future punishment "for contempt or further sanctioned", pursuant to Rule 3-5.1(c), insofar as this pertains to the imposition of "a comprehensive mental health evaluation conducted by a mental health practitioner approved by Florida Lawyers Assistance, Inc., is both unconstitutional and unlawful. As Respondent will show this imposition violates the established constitutional doctrine of in *Griswold v. Connecticut,* 381 U.S. 479 (1965), and constitutes prohibited retaliation and coercion made unlawful under the following provisions of the Americans With Disability Act: 42 U.S.C.S. §§ 12112(a), 12112(d)(4), 12201(d), and 12203(a) & (b).

II. THE COURT'S DISPOSITION ORDER OVERLOOKED THE FACT THAT RESPONDENT HAD COMPLIED WITH ALL THE REQUIREMENTS UNDER RULE 3-7.7, *R. Reg. Fla. Bar*, FOR INVOKING THE COURT'S JURISDICTION TO REVIEW THE CLAIMS OF ERROR RAISED IN HIS PETITION FOR REVIEW ON THE MERITS, AND MISAPPREHENDED THE RECORD BEFORE THIS COURT IN DENYING RESPONDENT REVIEW BY THE DRASTIC ACTION OF DISMISSING HIS PETITION UPON UNSPECIFIED GROUNDS, FOR WHICH NO JUSTIFICATION *UNDER THE RULES OF THIS COURT WAS SHOWN*

20) The record shows that Respondent filed his Petition For Review on February 26th, 2005, and an Amended Petition For Review on March 3rd, 2004. With his Amended Petition For Review, Respondent filed the following transcripts:

(I) Transcript of specially set motion hearing of June 1st, 2004 upon Respondent's

motion to dismiss for lack of forum and subject matter jurisdiction, etc.

(ii) Transcript of specially set motion hearing of June 3rd, 2004 upon Respondent's motion to dismiss for sham pleading, etc.

(iii) Transcript of motion calendar hearing of July 14th, 2004 upon The Bar's motion to require respondent to provide factual basis for statements subject to Rule 4-8.2.

(iv) Transcript of final hearing on November 8th, 2004, held in Respondent's absentia.

21) This is significant in that the only provision within Rule 3-7.7 that mentions grounds for the dismissal of a petition for review is contained in subsection (c)(2), regarding the "Record on Review", stating inter alia:

> ". . .The party seeking review shall be responsible for, and pay directly to the court reporter, the cost of preparation of transcripts. *Failure to timely file and serve all of such transcripts may be cause for dismissal of the party's petition for review*".

22) Following the timely filing of transcripts Respondent filed Notice of Supplemental Authorities To Amended Petition For Review on April 20th, 2005. Along with the Supplemental Authorities, Respondent filed on April 20th, 2005 his "Index Describing Documents On File With Clerk Of The Florida Supreme Court To Designate The Items Of Record Related To Respondent's Petition For Review". Respondent's Index described the different items filed in this case, as

reflected in the aforementioned case docket, as well as the undocketed filings that were submitted with the Referee's Report on December 27th, 2004. Respondent assigned numerical designations to both the docket and undocketed filings, in date sequence, for use as record reference citations in Respondent's Initial Brief, in lieu of an appellate record.

23) On April 27th, 2005, Respondent further supplemented the record with an Appendix Of Documents related to the records in the possession of The Florida Bar in TFB File No., 2003-71-056(11M), and that are also related to the court file in Dade Criminal Case No. F-01-003508. This Appendix contains 56 exhibits, of which 1-55 offer documentary support for Respondent's claim, previously noted in the record, that judicial tampering and corruption occurred in Case No. F-01-003505, and that the Florida Bar suborned perjury and /or false testimony from Dade Circuit Judges Maria Espinosa Dennis, Judge Manuel A. Crespo, Dade Assistant State Attorney's Stacey Glick and Jane H. Hyde, (a/k/a, Jane H. Grande), and former Dade Assistant State Attorneys Samantha Ruiz Cohen, (f/k/a Samantha Ruiz), and Michael Padula. Exhibit 56 is the prohibited advertisement from the March 15th, 2004 edition of the Florida Bar News, for Scott B. Saul, the presiding grievance committee chairman, who had signed the formal complaint.

24) As the Disposition order shows, Respondent satisfied the final requirement of Rule 3-7.7 by filing his initial Brief on August 11th, 2005, and Amended Initial Brief, on August 24th, 2005. Respondent's Initial Brief tracks the issues raised in Respondent's petition for review, as amended, and substantially conforms to the briefing formalities of Rule 9.210(a), and content requirements of Rule 9.210(b). Most importantly, Respondent's statement of the case and facts are extensively detailed with record and transcript references,

and his claims of error under the various argument sections are fully supported by citations of authorities.

25) All this shows the exhaustive effort Respondent took to bring before the Court a full and complete record of the proceedings before the referee, as described in Rule 3-7.4(1) [Record of Investigation before the grievance committee]; Rule 3-7.6(1) [Record before referee], and Rule 3-7.7(c)(2) [Record on Review before the Supreme Court]. Respondent documented each factual contention with citations to the record, and every legal argument was based on controlling precedent. Consequently, the Court has plainly misapprehended the record in basing the dismissal of Respondent's petition for review, as amended, upon unspecified rule violations and unknown court orders.

26) The Florida Bar's motion to dismiss contains no objection to Respondent's petition for review. The sole objection relates to the supposed late filing of Respondent's Initial Brief. In this connection, however, the Court overlooked the fact that with the filing of his "outstanding motion and petitions", requests to toll time in this Court were filed pursuant to Rule 9.300(d)(10). One such tolling request was filed with Respondent's substantive motion filed on May 3rd, 2005, and an amended motion to toll time was filed on May 5th, 2005, in conjunction with another substantive motion. As such, time tolling motions had been served prior to expiration of the one and only extension period permitted by the Court, up to and including May 4th, 2005. In addition, Respondent filed a second amended request to toll time on May 20th, 2005, in conjunction with the dispositive motion filed on that date too. All these time tolling motions remained pending as of the date of the Court's Dispositive Order of October 18th, 2005.

27) Pursuant to Rule 9.300(b):

> "... the service of a motion shall toll the time schedule of any proceeding in the court until disposition of the motion..."

As noted above, limitation upon the exception to Rule 9.300(b), under Rule 9.300(d)(10) "for all motions filed in the supreme court, *unless accompanied by a separate request to toll time*" was invoked. Neither Respondent's substantive motions and petitions, nor his accompanying "separate requests to toll time" had been disposed until the Court's Disposition order of October 18th, 2005. As such, the Court misapprehended that violations of the rules governing review proceedings or some unknown orders had occurred, since Respondent's initial Brief and amended initial Brief were within the automatic time tolling coverage of Rule 9.300(b) when filed.

28) To be sure, as this Court observed in *St. Paul Fire Marine Insurance Company v. Indemnity Insurance Company,* 675 So. 2d 590, 592 (Fla. 1996):

> "... the motions permitted in an appellate proceeding follow the procedure set forth in rule 9.300. The Tolling period of appellate motions is controlled by Rule 9.300(b)... [which] does not limit the tolling period to the parties participating in the motion. *The rule is clear on its, face that it suspends the time schedule of any [illegible] all proceedings irrespective of the movant* (emphasis added)

29) Thus: "Any motion timely served which is not excepted by Rule 9.300(d) tolls the time schedule of any appellate court proceeding until the Court disposes of the motion". See *Downey v. Zier & Hacker, P.A.*, 556 So. 2d 509 (4th DCA 1990). As such even The Bar's motion to dismiss caused the time to toll. See

Anderson v. Willis, 402 So. 2d 1344, 1345 (1st DCA 1981).

B. The Court Overlooked The Exceptional Circumstances That Affected The Timing Of Respondent's Initial Brief And Misapprehended The Absence Of Procedural Grounds To Deny Review

30) Respondent had been granted a single thirty (30) day enlargement of time for serving his initial brief up to and including May 4th, 2005, by order dated March 24th, 2005. In general, the thirty day period requested in Respondent's motion for enlargement of time stated different grounds, among which was that the free lance secretary with whom Respondent had contracted to employ for word processing services in connection with this case had been subpoenaed for Federal July Duty, for approximately a two week period, but whose actual length of service could not be predicated. It was noted that the free lance secretary in question has physical disabilities that are impairing, and as such performs word processing services for Respondent from her residence.

31) As respondent further explained, additional unexpected delays were due to the urgently scheduled surgery for his free lance secretary on May 6th, 2005, and to complications related thereto, that had made her only intermittently available over the next several weeks. (See Respondent's Memorandum In Opposition To Motion To Dismiss Amended Petition For Review, page 13, ¶ 29). Furthermore, Respondent's free lance secretary continued to undergo corrective procedures and intermittent hospitalizations through July 7th, 2005, the last of which required a three

week recovery period into early August.[1] Respondent was then able to call upon her services, so that his initial brief was duly filed on August 11th, 2005.

32) As stated in *Kerbs v. State*, 588 So 2d 38 (5th DCA 1991):

> "It is an established principle of law that dismissal of an appellate proceeding should be employed sparingly and only after repeated violations or contumacious disregard of a court's orders".

In *Kerbs,* the defendant filed a "belated request for extension of time to file his initial appellate brief, but [he] failed to meet the extended due date". Afterwards, the state moved to dismiss, but before the lower court granted this motion, the defendant did file his brief. Consequently, the 5th DCA held that "dismissal of the appeal was too harsh a sanction for the [late filing of initial brief]. 588 So. 2d at p. 39.

33) To be sure, this principle of appellate due process that the mere failure to file a brief on time is not so serious a violation to warrant the dismissal of an appeal has been uniformly followed by the courts of this State. See *Irvin v. Williams,* 736 So. 2d 705 (1st DCA 1999); *Shaw v. State, etc.,* 715 So. 2d 1148 (4th DCA 1998); *Leonard v. First Union Nat'l Bank of Florida,* 685 So. 2d 98 (3rd DCA 1997).

34) In addition, prior to dismissing an appeal as a sanction for a rule violation, Respondent was entitled to receive the ten (10) day notice required by Rule 9.410, *Fla. R. App. P.* See *Mirage Pools, Inc. V. Dewitt,*

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[1] See Exhibit "A", attached hereto, that describes the many orthopedic surgical procedures that said secretary has had to endure from 2004 through the present.

757 So. 2d 1280 (4th DCA 2000); *Marty v. Bainter,* 709 So. 2d 185 (1st DCA 1998).

35) Plainly, the Court misapprehended the fact the sole grounds stated in The Bar's motion to dismiss petition for review concerned the untimeliness of his brief. As shown above, however, the rules of this Court do not authorize the drastic action taken in the Disposition order of October 18th, 2005. As the cited case law shows, this action denies Respondent access to this Court, guaranteed by Article 1, Section 21, Florida's Constitution, and the procedural due process afforded by the rules of this Court. More seriously, as the following section will show, this also denies Respondent substantive due process.

C. Having Properly Invoked The Court's Jurisdiction Pursuant To Rule 3-7.7, *R. Reg. Fla. Bar,* Jurisdiction In This Court Was Vested Pursuant To Article V, Section 15, Florida Constitution, To Review Respondent's Claims Of Legal Error, Which Entitled Respondent To Review As A Matter of Substantive Right

36) Jurisdiction is the threshold question of every case, and must especially be given foremost consideration when this question relates to constitutional jurisdiction. *Steel Co. v. Citizens For A Better Environment,* 523 U.S. 83, 118 S.Ct. 1003, 1012 (1998). Original jurisdiction in this Court to review attorney discipline cases pursuant to Article V, Section 15, Florida Constitution, is "by direct review", rather than by an exercise of appellate review. *Petition of Florida State Bar Association. Etc.,* 40 So. 2d 712, 714 (Fla. 1976).

37) Pursuant to Rule 3-7.7(a)(1), Respondent had the right to procure review by this Court of the referee's

report, and secured this right by following the procedures for review outlines in Rule 3-7.7(c). As stated in subsection(c)(1), upon the filing of "a petition for review, specifying those portions of the report of a referee sought to be reviewed", jurisdiction vested "as to a review to be procured as a matter of right". In fact, the Court reserves jurisdiction even "to consider a late-filed petition" . . . upon a showing of good cause.

38) Under subsection (c)(5), the petitioning party had the burden "to demonstrate that a report of a referee sought to be reviewed is *erroneous, unlawful or unjustified.*" To this end, Respondent's petition for review, as amended, raises multiple constitutional, jurisdiction and legal challenges to the referee's report, showing the report to be "*erroneous, unlawful [and] unjustified*". The claims of error raised in the petition for review were documented and/or demonstrated by Respondent's dispositive motions and petitions filed on May 3rd, May 5th and May 20th, 2005, respectively. Each of these substantive filings is brief-like in nature, being divided into separate argument sections that are fully supported with citations to the record, comprising references to the appendixed exhibits, the indexed documents, and transcript pages.

39) To be sure, on May 3rd, 2005, Respondent filed a motion styled:

> "RESPONDENT'S MOTION TO PROHIBIT AND VACATE REFEREE'S REPORT AS THE PRODUCT OF A FALSE AND TAINTED CHARGING DOCUMENT IN DADE CRIMINAL CASE NO. F-01-003508(A), WHICH WAS THE PRODUCT OF AN ILLEGAL ARREST IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND THAT IS FURTHER CONSTITUTIONALLY PROHIBITED BY

VIOLATIONS OF THE JUDICIALLY APPROVED IMMUNITY CONFERRED UPON RESPONDENT BY THE DADE STATE ATTORNEY'S OFFICE IN CASE NO. F-01-003508(A), AND THAT WAS CONSTITUTIONALLY INVALIDATED BY THE PERJURED AND/OR FALSE TESTIMONY RELATED TO CASE NO. F-01-003508(A) WHICH FLORIDA BAR ELICITED FROM DADE CIRCUIT JUDGES AND FROM CERTAIN PRESENT AND FORMER DADE ASSISTANT STATE ATTORNEYS'.

40) As noted on pages 2-3 of this motion, the legal grounds for the relief therein sought is predicated upon the established constitutional doctrines announced by the United States Supreme Court in *Payton v. New York,* 445 U.S. 573 (1980): Fourth Amendment illegal arrest grounds; *Kastigar v. United States,* 406 U.S. 411 (1972): 5th Amendment – immunity grounds; and *Giglio v. United States,* 405 U.S. 150 (1972): 14th Amendment – due process grounds. The nature of these violations with respect to the proceedings before the Referee are described on pages *2-9* of that motion. ¶¶ 2-15. The 4th and 5th Amendment violations are described on pages *9-13*. ¶¶ 14-25; and the *Giglio* violations are described on pages 14-44, ¶¶ 26-103.

41) On May 5th, 2005; Respondent filed a petition to declare the disciplinary proceedings void due to improper and unlawful grievance committee actions and procedures, styled:

"RESPONDENT'S PETITION TO DECLARE THE DISCIPLINARY PROCEEDINGS IN THIS CAUSE TO BE VOID AND CONSTITUTIONALLY INVALID UPON

> THE GROUNDS OF FRAUD AND ILLEGALITY BY BAR COUNSEL BEFORE THE GRIEVANCE COMMITTEE; FOR VIOLATIONS OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS BEFORE THE GRIEVANCE COMMITTEE; AND FOR THE COLLUSIONAL NATURE OF THE GRIEVANCE PROCEEDINGS, THAT SUBVERTED THE JURISDICTIONAL INTEGRITY OF THE PROCEEDINGS".

42) This petition is separated into two counts, as described below:

> "COUNT I: DETERMINE AND DECLARE THE ACT OF STAFF COUNSEL IN SELF INITIATING THE INSTANT DISCIPLINARY PROCEEDING, WITHOUT COMPLAINING WITNESS, TO ENTAIL THE EXERCISE OF UNDELEGATED AND UNAUTHORIZED POLICE POWERS IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS";
>
> and:
>
> "COUNT II: DETERMINED AND DECLARE THAT BAR COUNSEL'S FRAUDULENT AND UNLAWFUL MANIPULATION OF THE GRIEVANCE PROCEEDING IN PURSUIT OF HIS RETALIATORY AND OPPRESSIVE OBJECTIVES, WAS ACHIEVED THROUGH THE USE OF A FABRICATED AND FORGED DOCUMENT THAT TENDED TO IMPLICATE RESPONDENT IN THE OFFENSES CHARGED IN CASE NO. F-01-003508, AND UPON A PERJURED AND INVALID CHARGING DOCUMENT AND

> FALSE CRIMINAL CHARGE, AND UPON SUPPRESSED, TAINTED AND CONSTITUTIONALLY PROHIBITED INFORMATION, WHICH SO PREJUDICED RESPONDENT BEFORE THE GRIEVANCE COMMITTEE AS TO HAVE RENDERED THE PROBABLE CAUSE OUTCOME, AND ALL PROCEEDINGS THEREON, NULL AND VOID".

Count I covers pages *3-12*, ¶¶ 1-26; and Count II covers pages *13-22*, ¶¶ 28-66.

43) On May 20th, 2005, Respondent filed a motion styled:

> "RESPONDENT'S PETITION TO PROHIBIT AND DECLARE VOID THE REFEREE'S REPORT AS THE PRODUCT OF THE DISQUALIFYING, PROCEDURALLY IMPROPER, JURISDICTIONALLY INVALID ACTS AND PROCEEDINGS BY AND FOR THE REFEREE".

This motion is separated into four counts as follows:

> "*COUNT I*: The referee Colluded with Bar Counsel To Violate This Court's Appointment Order And Her Own Pre-Trial Order By Contriving The Cancellation Of The Trial Schedule For The Week Of July 19th, 2004, By Filing Pretextual Motions For Report Extension Periods That The Bar Used To Suborn Perjury By Judge Dennis, And By Pre-Arranging The Final Hearing Without Proper Notice To Respondent, In Patent Violation Of The Rules Regulating the Florida Bar";
>
> "*COUNT II*: The Orders Granting The Bar's Motions Requiring Respondent To Provide

> Bar Counsel With The Factual Basis For The Alleged Rule 4-8.2(a) Statements, Are Unauthorized, Irrational, Unlawful And Violated Respondent's Substantive Due Processes Right's";
>
> "*Count III*: The Referee Engaged In Patently Disqualifying Conduct Described In Each Of Respondent's Three Motions For Disqualification and Engaged In Other Prohibited, Prejudicial and Disqualifying Acts In Relation To And Apart From The Matters Raised In Said Motions For Disqualification, Such As To Deprive The Proceedings Of Jurisdiction And Substantive Due Process"; and
>
> "*COUNT IV*: The Referee Abdicated Her Adjudicative Function And Authority Pursuant To Rule 3-7.6 To Conduct An Adversarial Proceeding And To Hear, Try And Determine The Matters Presented At The Final Hearing By Deferring To The Bar's Counsel On All Issues Of Law, Procedure And Proof, And Did Thereby Eviscerate The Judicial And Or Quasi-Judicial Character Of The Proceedings".

Count I covers pages *4-21* of this petition, ¶¶ 6-52; *Count II* covers pages *21-36*, ¶¶ 54-90; *Count III* covers pages *36-46*, ¶¶ 92-114; and *Count IV* covers pages *46-55*, ¶¶ 116-141.

44) Respondent's motion of May 3rd, 2004, to prohibit and vacate referee's report, addresses issues raised in Respondent's Amended Petition For Review, Parts II(C) and IV(D). Respondent's petition of May 5th, 2005, to declare disciplinary proceedings void, addresses issues raised in Parts I(A), I(B), II(A), II(B),

II(D), and III(A) of his Amended Petition to prohibit and declare void referee's report of May 20th, 2005, addresses issues raised in Parts IV(A) and IV(C) of his Amended Petition For Review. Furthermore, Respondent's motions of May 5th shows that the report was vitiated by its reliance upon illegal and constitutionally prohibited evidence and testimony, as established in *Payton v. New York,* 445 U.S. 573 (1980); *Kastigar v. United States,* 405 U.S. 150 (1972); and *Giglio v. United States,* 405 U.S. 150 (1972).

45) Respondent's petition of May 5th, shows that the complaint was vitiated by improper and irregular procedures before the grievance committee that violated due process. *Petition of Florida State Bar Association*, 186 So. 280, 290 (Fla. 1938); *In Re Integration Rule Of Florida Bar,* 103 So. 2d 873, 875-76 (Fla. 1956); *State ex rel. The Florida Bar v. Grant,* 85 So. 2d 232, 235-36 (Fla. 1956). And Respondent's Petition of May 20th shows that the procedures adopted by the referee created a dysfunctional and aberrational process that rendered a report that is jurisdictionally and constitutionally null and void. The Court's jurisdiction was invoked in those filings pursuant to the Court's original jurisdiction under Art. V, Section 15; Rule 3-7.7(a); and *App.* Rule 9.030(a)(3). It was also invoked pursuant to the Court's ancillary jurisdiction under Rule 3-7.7(e), and *App.* Rule 9.040(a).

46) Dispositive issues of jurisdiction and immunity were addressed by way of "original motion" in *The Florida Bar v. McCain, supra,* pgs. 713-714. Similarly, by direct petition the Court addressed an issue of constitutional jurisdiction related to the regulation of the practice of law in *The Florida Bar v. Moses,* 380 So. 2d 412, 413-16 (Fla. 1980). Also, in *Moses*, the Court addressed the application of its own decision in *The Florida Bar v. Sperry,* 140 SO. 2d 587, 591 (Fla. 1962)

and *The Florida Bar v. Brumbaugh,* 355 So. 2d 1186, 1190-92 (Fla. 1978); and the United States Supreme Court's decision on the 6th Amendment right of self-representation in *Faretta v. California,* 442 U.S. 806 (1975), to determine the issues of jurisdiction there.

47) These cases were cited in Respondent's motion to dismiss for lack of forum and subject matter jurisdiction, filed in this Court on February 12th, 2004, prior to the Referee's appointment (see Respondent's Index, Ex. "6"). Also cited was this Court's decision in *The Florida Bar v. Brake,* 767 So. 2d 1163 (Fla. 2000), holding that pro se, litigation-related conduct, without more, cannot support the allegations of misconduct alleged in the complaint, and now restated verbatim in the referee's report.

48) In general, Respondent's motion to dismiss contends that his right to self-representation guaranteed under the Sixth Amendment made his pro se filings in defending against an undeniably wrongful prosecution is constitutionally protected conduct. Additionally Respondent there contended that Respondent's reliance upon the procedures for disqualification, provided by Rule 2.160, *Fla. R. Jud. Admin.,* and authorized by *Fla. Stat.* § 38.10, also involved privileged speech, protected under the First Amendment, and by the well established litigation privilege recognized by this Court. See *State, etc. v. Sullivan,* 26 So. 2d 509, 515 (Fla. 1946): *Fridovich v. Fridovich,* 598 So. 2d 65, 66-67 (Fla. 1992): *Levin, Middlebrooks, Mabie, etc. v. United States Fire Inc. Co.,* 639 So. 2d 606, 607-08 (Fla. 1994). These contentions were also raised in Respondent's petition for review.

49) Consequently, the constitutional and jurisdictional issues raised in Respondent's motion to dismiss, in his petition for review, as amended, and in his substantive motions filed on May 3rd, May 5th,

and May 20th, are all within the Court's original jurisdiction for review. The various challenges and claims of error contained in those filings were also incorporated into Respondent's initial Brief, under different argument sections. Because The Florida Bar filed no cross-petition, did not deny or dispute the claims of illegality and constitutional invalidity document in his dispositive motions and petitions, and served no Answer Brief, Respondent has presumptively met his burden before the Court to demonstrate the report is "erroneous, unlawful or unjustified".

50) Therefore, the Court's decision to rescind its original jurisdiction to review the merits of Respondent's claims of error, by means of its Disposition order of October 18th, 2005, conferred an unauthorized finality upon the referee's report, and the disciplinary measures recommended therein, contrary to the review requirement in Rule 3-7.7(C)(6), for entry of "an appropriate order of judgment" by this Court. Not only did the Court misapprehend that the effect of this action is to deny Respondent substantive due process, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, but as shown in the next section, the absence of review converted this disciplinary proceeding into a Bill of Attainder.

D. The Court's Approval Of The Referee's Report Through A Divestiture of Its Exclusive Jurisdiction To Review The Merits Of Respondent's Claims Of Legal Error, Thereby Surrendering To The Referee The Unsupervised Discretion To Convict And Punish, Created A Non-Judicial Punitive Process That Resembles A Bill of Attainder.

51) That attorney disciplinary proceedings are penal, "quasi-criminal" in nature is well settled. *Spevak*

v. Klein, 385 U.S. 511 (1967); *In Re Ruffalo,* 88 S. Ct. 1222, 1226 (1968). Although the constitutional jurisdiction to regulate the practice of law is exclusively vested in this Court, it has made the Board of Governors acting in the name of The Florida Bar, and the referee assigned to hear the case, its designated disciplinary agents, pursuant to Rules 1-4.2, 3-3.1 and 3-7.6(a). To these disciplinary agents, the Court had delegated the task of "ferreting out all pertinent facts" and in doing so, these officials are the "mere arms of this Court", subject always to the supervision of this Court, and having "no greater jurisdiction or authority than this Court possesses". *The Florida Bar v. McCain,* 330 So. 2d 712, 714 (Fla. 1976).

52) As such, The Florida Bar has no independent authority to regulate the practice of law. It is not an executive agency or licensing board within the purview of Article IV, Section 6, Florida Constitution, and so possesses no enforcement authority beyond that delegated by this Court. Indeed, the integrated Bar is the functional equivalent of a closed shop labor organization. *Lathrop v. Donahue,* 367 U.S. 820, 827-28, 848-50 (1961). Still, the Court's act of integration does not create an independent state agency. *Keller v. State Bar Of California,* 496 U.S. 1,13 (1990).

53) The doctrine of separation of powers and guarantee of a republican form of government, contained in Article VI, Section 4, United States Constitution, and under Article II, Section 3 (Branches Of Government), Florida Constitution, requires this Court to perform a judicial function with respect to the record and the merits of the claims of error Respondent had presented for review. *Lathrop v. Donahue,* 367 U.S. at 854. *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935).

54) This means the de novo review mandated by the Court's original jurisdiction under Article V, Section 15. See *The Florida Bar v. McCain,* 330 So. 2d at 713-14; *Florida Bar v. Moses,* 380 So. 2d 412,413-16 (Fla. 1980). For the Court to surrender this constitutional responsibility to The Florida Bar, under the formalism of approving the referee's report, is to allow a purely punitive process to take place, whereby findings of guilt and disciplinary measures are visited by unconstitutional means, and without judicial review.

55) A Bill of Attainder is any form of "punishment upon an identifiable individual without protection of judicial trial. *Mones v. Austin,* 318 F. Supp. 653 (S.D. Fla. 1970); *Mayes v. Moore,* 827 So. 2d 967 (Fla. 2002). As such, The Court's Disposition order of October 18th, 2005, resembles a Bill of Attainder, since the operation of this punishment by decree "would constitute deprivation without due process of law". *Jones v. Slick,* 56 So 2d. 459, 461-62 (Fla. 1952).

III. THE COURT FAILED TO APPREHEND THAT IT HAD APPROVED A FACIALLY DEFECTIVE REPORT, PROCURED THROUGH CONSTITUTIONALLY INFIRM AND EX PARTE MEANS, AND THAT IN ACTING THEREON TO REPRIMAND AND PLACE RESPONDENT ON PROBATION, THE COURT OVERLOOKED THAT NO COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THIS DISCIPLINE EXISTS IN THE RECORD, AND IN FACT, THE RECORD CLEARLY CONTRADICTS THE REFEREE'S CONCLUSIONS

A. The Report Merely Restates Verbatim The Insufficient Allegations Of the Complaint, And Was Procured Through Constitutionally Infirm and Ex Parte Means.

56) As described on pages 43-44, of Respondent's Amended Petition For Review, Section IV(D), ¶¶ 1-26, the report's recommended findings and disciplinary measures were prepared unilaterally Bar Counsel, and presented ex parte to the referee for filing. Likewise, the record shows that the proposed findings and conclusions contained in the report were adopted by the referee without benefit of the transcripts, and without supporting evidence. In effect, the referee acted as a surrogate for The Florida Bar, in violation of Can[ ]on 3(B)(7), Florida Code of Judicial Conduct; and in derogation of her assignment under Rule 3-7.6(k), *R. Reg. Fla.* Bar, to prepare the report upon an evidentiary record that must include:

> "A) a finding of fact as to each item of misconduct of which respondent is charged . . . "
>
> "B) recommendations as to whether the respondent should be guilty of misconduct justifying disciplinary measures;
>
> "C) recommendations as to the disciplinary measures to be applied."

57) Respondent had established that The Florida Bar and the referee engaged in ex parte contacts on or before October 19th, 2004, to secretly pre-arrange the final hearing for November 8th 2004. The record reflects that no case management conference or calendar call was held for the setting of the final hearing, contrary to Rule 3-7.6(c). A certified mailing containing notice of this hearing was sent to Respondent's high rise residence on October 25th, 2004, that failed even to afford Respondent with the minimum notice required by Rules 1-13.1(c) & (b), and Rule 3-7.6(h).

58) As noted earlier, the findings of misconduct recited in the report are mostly comprised of the allegations of the complaint, restated in the standard report

format. As likewise noted above, reported misconduct affirmatively shows that Respondent was acting pro se, and engaged in authorized, privileged and constitutionally protected conduct under the rules and precedents of this Court and the United States Supreme Court. See Rule 2.160, *Fla. R. Jud. Admin,* and *Fla. Stat.* § 38.10; Rule 3.111(d), *Fla. R. Crim. P., Tableau Fine Art Group, Inc. v. Jacoboni,* 853 So. 2d 299 (Fla. 2003); *Rogers v. State,* 630 So. 2d 513 (Fla. 1994), *State, etc. v. Sullivan,* 26 So. 2d 509, 515 (Fla. 1946); *Faretta v. California,* 422 U.S. 806 (1975); *New York Times Co. V. Sullivan,* 376 U.S. 254 (1964). It was likewise noted the reported misconduct, consisting solely of protected speech, does not involve the practice of law, and does not transgress the specific terms of any disciplinary rule. *The Florida Bar V. Sperry,* 140 So. 2d 587, 591 (Fla. 1962); *The Florida Bar v. Brumbaugh,* 355 So. 2d 1186, 1190-92 (Fla. 1978); *The Florida Bar v. Moses,* 380 So. 2d 412, 416-17 (Fla. 1980); *The Florida Bar v. Brake,* 767 So. 2d 1163, 1168 (Fla. 2000).

59) During the pre-trial proceedings, The Florida Bar filed unauthorized and coercive motions to compel Respondent to provide a factual basis for statements allegedly subject to Rule 4-8.2(c). (See Respondent's Index of Documents, Exs. "*22*", "*23*", "*36*" & "*38*"). The Referee granted these motions by orders dated July 14th, 2004 and September 29th, 2004, respectively. (Ibid, Exs. "*28*" & "*39*"). The express objective of these referee orders compelling compliance with The Bar's Rule 4-8.2(a) motions was to shift The Bar's burden of proof unto Respondent for discovery and evidentiary purposes, which operated as an invalid pre-trial presumption, unauthorized under Evidence Code Sections 90.301-90.304, and made improper under this Court's decision in *Valcin v. Public Health Trust of Dade County,* 507 So. 2d 596,

599-600 (Fla. 1987). More seriously, this also entailed a form of unconstitutional coercion in violation of the 5th Amendment. *Spevak v. Klein,* 385 U.S. 511 (1967); *State ex rel. Vinning v. Florida Real Estate Commission,* 281 So. 2d 487 491-92 (Fla. 1973).

60) Not a single witness[] testifying for The Florida Bar was asked to identify a single court document or entry that refuted, much less disproved, any matter alleged by Respondent in his sworn motions for disqualification, or related filings. Instead, testimony by the Bar's witnesses was related to a novel theory of tribunal disruption, despite the fact no such allegation of misconduct is alleged in the complaint, and no charge of Disruption of Tribunal, in violation of Rule 4-3.5(c) was ever made. However, as indicated by the transcript of November 8th, 2004, the referee relied upon this testimony about Respondent "being disruptive", in support of the disciplinary measures requested by The Bar. (pg. 134, *l.* 10-16).

61) This novel theory of misconduct, based upon the claim of tribunal disruption, was outside the allegations of the complaint, and thus outside the referee's subject matter jurisdiction pursuant to Rules 3-7.6(b) and 3-7.6(k)(1)(a). More seriously, to subject Respondent to discipline based upon an unnoticed and uncharged rule violation violates basic due process. *In Re Ruffalo,* 88 S. Ct. 1222, 1226 (1968); *The Florida Bar v. Price,* 478 So. 2d 812, 813 (Fla. 1985).

B. The Disciplinary Measures Recommended By The Referee Are Based Upon Materially False And Uncharged Matters Recited In Paragraphs 11 and 12, of Part II, And Paragraph (A)(I) & (2) of Part IV

62) In paragraphs 11 and 12 of Part II of the Report, reciting "Findings of Fact As To Each Item Of Misconduct Of Which Respondent Is Charged", The Bar inserted matters for which Respondent was never charged, related to Respondent's non-attendance at hearings on September 29th, 2004, and on November 8th, 2004 (paragraph 11); and related to Respondent's "numerous documents in this case where he attacked Bar counsel's credibility" (Paragraph 12). Regarding the hearings of September 29th, 2004, and November 8th, 2004, in each instance, Respondent had delivered distinct motions for disqualification of referee, on September 20th, 2004, and on November 8th, 2004, respectively, that were pending at the time those hearings were held. (See Respondent's Index Of Documents, Exs. "*37*" and "*46*").

63) In fact, it was on September 22nd, 2004, after Respondent had delivered his motion for disqualification of September 20th, 2004, that The Bar noticed its motion to compel compliance with Rule 4-8.2(a) order for September 29th, 2004 (Ibid, Ex. "*38*"). The referee granted that motion at an ex parte hearing on September 29th, 2004 (Ibid, Ex. "*39*"). Yet the referee did not act upon Respondent's pending motion for disqualification until on or about October 4th, 2004 (Ibid, Ex. "*41*").

64) Afterwards, further ex parte contacts took place between The Florida Bar and the referee, whereby it mailed to the referee the original transcript of the hearing of September 29th 2004, on October 20th, 2004, (Ibid, Ex. "*42*"). This occurrence, along with the

aforestated absence of adequate notice of hearing, formed the basis of Respondent's motion for disqualification delivered on the morning of November 8th, 2004 (Ibid, Ex. "*46*"). As indicated in the transcript of that hearing, the referee commenced the hearing by engaging Bar counsel in ex parte discussions over the sufficiency of Respondent's motion for disqualification, and directed Bar Counsel to determine its sufficiency for her. (Transcript, pg. 5, *l.* 6-13; pg. *9*, *l.* 6-15).

65) Thus, the referee had disregarded the absolute mandates of Rule 2.160, *Fla. R. Jud. Admin.*, by conducting the hearing on September 29th, 2004, while Respondent's motion for disqualification of September 20th, 2004 was pending; and by commencing the hearing on November 8th, 2004, without even deciding for herself the sufficiency of Respondent's motion for disqualification delivered thereon. These departures from the clear requirements of law could not be foreseen. *Tableau Fine Art Group, Inc. V. Jacoboni,* 835 So. 2d 299 (Fla. [2003).] Indeed, Respondent was entitled to rely upon the requirement that the referee act with judicial restraint while his motions for disqualification were pending. *Fuster-Escalona v. Wisotsky,* 781 So. 2d 1063 (Fla. 2000); *Shah v. Harding,* 839 So. 2d 265 (3rd DCA 2003).

66) Regarding the conclusion that Respondent "attacked Bar counsel's credibility", the exact nature of this attack is nowhere shown, much less that any such attack was unjustified. Indeed, Respondent had documented in his "outstanding motions and petitions" the many occasions when Bar counsel made material misrepresentations before the grievance committee, and before the referee, that subverted the integrity and fairness of those proceedings. A few examples from the November 8th, 2004 transcript speak for [itself].

67) Thus, on page *133*, lines 19-22, Bar counsel states:

> "Judge [Dennis] had to deal with numerous delays to the docket based on his actions of filing all these motions".

On the same page, lines 23-25, he states:

> "Judge Crespo had to take ... an extra amount of time in dealing with [Respondent's] actions".

Then, on page *142*, lines 14-21, Bar counsel argues:

> "His actions were prejudicial to the administration of justice ... Basically, he caused the system to be bogged down with his case, *Making claims he had no right to make.* It just jammed up the system in handling his case."

68) However, because these fantastic statements by Bar counsel were wholly unsupported and unprovable, it was only he who was "making claims he had no right to make". Of course, Bar counsel's most flagrant misrepresentation related to the false testimony he elicited from Judge Dennis about Respondent's refusal to comply with her competency evaluation order (See Respondent's Appendix Ex. "*35*"), and his reliance upon that false testimony in support of The Bar's demand for another evaluation order (Transcript, pg. 170, *l.* 11-25).

69) Part IV(A)(1) and (A)(2) of the report recommend disciplinary measures upon Sanction Standards that also depend upon unalleged and uncharged kinds of misconduct. Under sub-part (A)(1), the referee relied on Standard 6-23, which concerns abuse of the legal process by failing "to comply with a court order or rule, and ... causes interference ... with a legal

proceeding." And under sub-part (A)(2), the referee relied on Standard 9.22(e), which concerns the "bad faith obstruction of the disciplinary proceedings, etc.". However, as noted above, Respondent was not charged with any such misconduct. He was not charged with disruption of [any] tribunal based upon Rule 4-3.5(c). He was not charged with a violation of Rule 4-8.4(a) for attempting to violate the Rules of Professional Conduct. Nor was he charged with a violation of Rule 4-8.4(g) for failing to respond in writing to any official inquiry by bar counsel or disciplinary agency.

70) Beyond this, no evidence exists anywhere of Respondent failing to comply with a court order or rule, or of having engaged in the bad faith obstruction of the disciplinary proceeding, nor was any such evidence shown. Still, the basic problem with paragraphs II and 12 under Part II, and paragraph (A)(1) and (A)(2) of Part IV, overlooked by this Court, is that the reliance on these unalleged and uncharged recitals of misconduct to support the recommended disciplinary measures violates basic due process. *In Re Ruffalo,* 390 U.S. 544 (1968); *The Florida Bar v. Price,* 478 So. 2d 812 (Fla. 1985).

C. In Placing Respondent On Probation, The Court Overlooked The Absence Of Competent, Substantial Evidence Or Other Justification In The Record For This Enhancement of Discipline

71) The Bar's evidence consisted of witness testimony in disagreement with Respondent's written statements of belief, but without any documentary basis to show the inaccuracy of Respondent's written statements. That proof could only come from certified copies of the record, in accordance with Evidence Code Sections, 90.901, 90.902(4) and 90.955(1). See

Oliver v. Haspil, 152 So. 2d 758 (3rd DCA 1963); *Bergeron Land Development, Inc. v. Knight,* 307 So. 2d 240 (4th DCA 1975). No witness was designated or qualified to testify as an expert. Thus, their non-expert opinions related to the proceedings of record in Respondent's criminal case lacked probative value. *Mann v. State,* 3 So. 207 (Fla. 1887); *Jones v. State,* 32 So. 793 (Fla. 1902).

72) Likewise, their personal opinions were incompetent to disprove the veracity of Respondent's statements. *See Throp v. State,* 777 So. 2d 385 (Fla. 2000); *Charles v. State,* 683 So. 2d 583 (4th DCA 1996); or to describe his mental condition. *Spencer v. State*, 842 So. 2d 52 (Fla. 2003). As such, this witness testimony amounted to no more than forms of ineffective or improper impeachment, pursuant to Evidence Code Sections 90.404(1), 90.608 and 90.806(1). See *Erp. v. Carroll,* 438 So. 2d 31, 39 (5th DCA 1983).

73) No justification appears in the record for the enhanced sanction of probation. The court cites its decision in *The Florida Bar v. Anderson,* but misapprehends its application to this case. There The Florida Bar had filed a petition for review to enhance the sanction. None was filed here. Also, in exercising the Court's broader scope of review over the referee's recommendations for discipline, the Court justified this action upon the factual record and the nature of the violations shown in that case. But that was not done here, either.

74) In *Anderson,* the violations involved the preparation of an appellate brief that misrepresented the facts of the case, and making extended argument on the inaccurate facts, and then failing to correct the inaccuracies when made known. Again, nothing of the sort exists in this case.

75) Respondent was not charged with a violation of Rule 4-3.3(a)(1), for making a false statement of material [] fact or law to a tribunal; or with a violation of Rule 4-8.4(c), for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. To be sure, Bar Counsel conceded to the referee that Respondent had not been dishonest. (Transcript of November 8th, 2004; pg. *157, l.* 5-7).

76) By contrast, it is The Florida Bar's case that was dishonest, as indicated above. Indeed, its presentation rested largely upon the impeached testimony of Dade Circuit judges Maria Espinosa Dennis, and Manuel Crespo, whom Respondent had criticized in court filings. Yet, the record that Respondent brought to this Court's attention demonstrates the legitimate grounds for that criticisms, based upon the actual record in Respondent's criminal case. In doing so, Respondent further documented that both Judges Dennis and Crespo testified falsely and, as such, were the subject of his *Giglio* motion, filed on May 3rd, 2005. Beyond this, Can[]ons 3B(a) and 3B(11), Code of Judicial Conduct, prohibited The Bar from calling Judges Crespo and Dennis as witnesses against the criticisms leveled by Respondent in motions for disqualification, especially since Rule 2.160, *Fla. R. Jud. Admin.*, made their testimony improper.

IV. THE NATURE AND PURPOSE OF THE INDEFINITE PERIOD OF PROBATION IS SO VAGUE AS TO QUIRE CLARIFICATION OF THE EXACT CONDITIONS UPON WHICH IS TO BE DETERMINED

77) Pursuant to Rule 3-5.1(c), a member found guilty of misconduct can be "placed on probation for a stated period of time . . . or for an indefinite period of

time determined by the conditions of the order". Rule 3-5.1(c) requires the "judgement [to] state the conditions of the ~~order~~ [probation]", such as those indicated in subsections (1)-(6). As none of the conditions described under those subsections pertain here, and given the absence of a judgment stating "the conditions of the ~~order~~ [probation]", as required by Rule 3-5.1(c), the indefinite period of probation is impermissibly vague.

78) In fact, given the Court's modifying language that pursuant to Rule 3-5.1(c), "respondent may be punished for contempt or further sanctioned", for violating his probation, the probationary sanction is unconstitutionally vague. The failure to give Respondent fair notice of what he must do to avoid further punishment violates due process. *In Re Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 1226 (1968); *Grayned v. City Of Rockford,* 408 U.S. 104, 108-09 (1972); *Broadrick v. Oklahoma,* 413 U. S. 601, 607 (1973).

V. IN FAILING TO STRIKE PART IV(D)(1) OF THE REPORT ALTOGETHER, THE COURT MISAPPREHENDS THE UNAUTHORIZED, UNCONSTITUTIONAL AND UNLAWFUL NATURE OF IMPOSITION

79) The sovereign jurisdiction of this Court to regulate the practice of law plainly does not confer unbounded police powers upon this Court to visit forms of punishment that are neither authorized by the rules of this Court, or where the police powers of the state are limited by Florida's other constitutional guarantees. In this instance, the power to force Respondent to submit to a comprehensive mental health evaluation of Florida Lawyers Assistance is constrained by Article I, Section 18 (Administrative Penalties) and Article I, Section 23, (Right of Privacy).

80) Regarding Article I, Section 18, no administrative penalty may be imposed "except as provided by law". However, as noted above, no competent substantial evidence exists to support ~~Respondent~~ this disciplinary measure. It is not listed among the conditions of probation that may be ordered pursuant to Rule 3-5.1(c)(1)-(6). The required procedures under Rule 3-7.13 to determine incapacity because of physical or mental illness were not followed. And, parenthetically, this case does not involve the "personal use and/or possession for personal use of controlled substances" so as to authorize a referral to Florida Lawyers Assistance pursuant to Sanction Standard 10.

81) Under Rule 3-7.1, *R. Reg. Fla. P.*, confidentiality is extended to an attorney who **"voluntarily"** ~~treatment~~ sought treatment for psychological problems, as provided in subsection (o). Because voluntary treatment is defined under Rule 3-7.1(o) to ~~exclude~~ [be] treatment that is "not a part . . . of a disciplinary sanction imposed under these rules", Respondent would forfeit confidentiality for the compulsory evaluation and treatment that the referee recommended at The Florida Bar's request.

82) This violates Respondent's right of privacy, guaranteed under Article I, Section 23. This is a fundamental right, which the state must show compelling state interest to overcome. *City of North Miami v. Kurtz,* 633 So. 2d 1025 (Fla. 1995). Thus, the Court has overlooked the absence of any such showing in the record before it.

83) More seriously, this imposition violates Respondent's right of privacy guaranteed under the United States Constitution, as established by *Griswold v. Connecticut,* 381 U.S. 479 (1965). This Court must have misapprehended the holding in *Griswald,* so it is worth repeating below:

> "The Fourth and Fifth Amendments were described in Boyd v. United States [citations omitted] as protections against all governmental invasions 'of the sanctity of a man's home and the privacies of life' . . . ".
>
> * * *
>
> "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees . . . Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms' [citations omitted]".

84) The Court also misapprehends that this imposition is prohibited and unlawful under the Americans with Disabilities Act, 42 U S C S §§ 12101 et seq. Section 12112(a) prohibits discrimination by a covered entity against an individual with a disability. Section 12112(d)(4) prohibits discrimination related to medical examinations and inquiries. Section 12201(d) pertaining to **"Accommodations and services"**, provides:

> "Nothing in this Act shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept".

Lastly, Section 12203(a) and (b) prohibits retaliation, discrimination, coercion, or threatened coercion "against any individual because such individual has opposed any act or practice made unlawful by this Act".

85) Unfortunately, this Court overlooked the fact that *Griswold v. Connecticut, supra,* is the law of the land and binds this Court under the Supremacy clause. This Court also overlooked the fact that the right to be free from state sponsored coercion or discrimination related to medical evaluation and treatment was considered so substantial by Congress that the state's immunity under the Eleventh Amendment was abrogated pursuant to 42 U. S. C. S. § 12202. For this reason, the Court must grant rehearing and strike paragraph IVD(1) of the Report in its entirety.

WHEREFORE, Respondent moves for rehearing and clarification for the reasons set forth above.

EXHIBIT "A"

HOLLYWOOD-CORAL SPRINGS PODIATRY

David Clendenning D.P.M.
Paul Gregoline D.P.M.
Jennifer Edwards D.P.M.

4420 Sheridan Street Ste. C
Hollywood Florida 33021
Phone (954) 989-8850
Fax (954) 989-3431

Secretary's List of surgeries As Of November 8th, 2005

1. 6-30-2004 Left foot repair hammer-toes and metatarsal damage
2. 9-28-2004 left foot repair of screw and right foot hammer-toes and metatarsal damage
3. 1-28-2005 total knee replacement (r) oncore "3 D" Knee Dr Rech
4. 5-6-2005 repair left foot take out pin and plate in big toe and repair baby toe on right foot.
5. 6-4-05 right foot tendon release two toes next to the big one

6. 7-13-05 right foot remove screws and neuroma

7. 10-14-05 right foot second remove of neuroma

8. 11-18-05 scheduled for removal of metatarsal on both feet due to server[e] crippling arthritis

/s/ [Illegible]
Hollywood Coral Springs
Podiatry

APPENDIX P

[LOGO] Center *for* Professional Responsibility

Lawyer Regulation for A New Century
Report of the Commission on Evaluation of Disciplinary Enforcement

February 1992

American Bar Association
Center for Professional Responsibility

Commission on Evaluation of Disciplinary Enforcement (1989-1992)

Raymond R. Trombadore, Chair
Somerville, New Jersey

Robert B. McKay, Chair 1989-1990 (deceased)
New York, New York

Hon. Oscar W. Adams, Jr.
Birmingham, Alabama

Don Mike Anthony
Pasadena, California

John T. Berry
Tallahassee, Florida

Ellen Feingold
Boston, Massachusetts

Donald M. Haskell
Astoria, Oregon

Charles W. Kettlewell
Columbus, Ohio

Timothy Kevin McPike, Reporter
Chicago, Illinois

Charlotte K. Stretch, Special Counsel
Longwood, Florida

DEDICATION

> No lawyer, and no client, can be indifferent to the disciplinary enforcement system. If the process is performed sensibly and quickly it will provide for lawyers and clients alike a needed service to assure honorable and effective delivery of legal services. If the disciplinary process does not meet that standard, a disaffected public is likely to impose limits upon the process. . . . Continuity of judicial regulation of the legal profession depends on action taken by the profession itself
> *Robert B. McKay*, 1990

The report of the ABA Commission on Evaluation of Disciplinary Enforcement is dedicated to Robert McKay, who served as the Commission's Chair until his death in July 1990. Professor McKay possessed an innate devotion to equality and social responsibility. During his lifetime, he became a symbol of public service and of commitment to the public interest.

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- Recommendation 4: Lawyer Practice Assistance Committee
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* * *

Recommendation 5
Independence of Disciplinary Officials

All jurisdictions should structure their lawyer disciplinary systems so that disciplinary officials are appointed by the highest court of the jurisdiction or by other disciplinary officials who are appointed by the Court. Disciplinary officials should possess sufficient independent authority to conduct the lawyer discipline function impartially:

5.1 Elected bar officials, their appointees and employees should provide only administrative and other services for the disciplinary system that support the operation of the system without impairing the independence of disciplinary officials.

5.2 Elected bar officials, their appointees and employees should have no investigative, prosecutorial, or adjudicative functions in the disciplinary process.

5.3 The budget for the office of disciplinary counsel should be formulated by disciplinary counsel. The budget for the statewide disciplinary board should be formulated by the board. Disciplinary budgets should be approved or modified directly by the Court or by an administrative agency of the Court. Disciplinary counsel and the disciplinary board should be accountable for the expenditure of funds only to the Court, except that bar associations may provide accounting and other financial services that do not impair the independence of disciplinary officials.

5.4 Disciplinary counsel and staff, disciplinary adjudicators and staff, and other disciplinary agency personnel should be absolutely immune from civil liability for all actions performed within the scope of their duties, consistent with ABA MRLDE 12A.

Comments

State and local bar officials provided the impetus for the development of ethical standards and disciplinary mechanisms. Bar officials have also volunteered years of dedicated service to the disciplinary function. These recommendations should in no way be taken as a derogation of that dedication and service. The recommendations are a recognition of basic principles of checks and balances and of separation of powers. A lawyer can appropriately serve the profession as an elected bar official and as an appointed disciplinary adjudicator – but not simultaneously.

Bar associations still can have a fundamental role to play in professional discipline, although not in the processing of cases. In states where no regulatory arm of the highest court exists, bar associations conduct the registration of lawyers and maintain registration records. They provide accounting and financial services, the physical plant and office equipment, ancillary staff services, and many other functions necessary to the operation of the disciplinary agency.

This recommendation modifies existing provisions of Model Rule of Lawyer Disciplinary Enforcement 2.

Several state bar associations have asked whether this recommendation would eliminate the justification for

unified state bar associations under *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). This concern is unfounded. The Court in *Keller* clearly distinguishes those activities that do and do not justify the imposition of mandatory dues for unified state bar membership. The Court stated:

> Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.
>
> . . . .
>
> Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State." Lathrop, 367 U.S., at 843, 81 S.Ct., at 1838 (plurality opinion).
>
> *Keller*, 110 S.Ct. at 2236

The Court recognized that unified bar activities were on a continuum ranging from purely "ideological" to purely "regulating the legal profession and improving the quality of legal services." The Court also recognized that in some cases the distinction might be difficult to make. However, the Court identified several activities that are clearly one or the other:

> But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a

gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.

Keller at 2237

The Commission recognizes that unified bars can appropriately perform non-prosecutorial and non-adjudicative functions that are essential to the disciplinary system. These are clearly "activities connected with disciplining members of the bar" under *Keller*.

It is important to recognize that the Court in *Keller* identified lawyer disciplinary functions and proposing ethical codes as *examples* of "the other end of the spectrum" to which "petitioners have no valid constitutional objection." These are however only examples. The Court clearly states the *functional* definition of regulatory activities that justify the existence of a unified bar:

Precisely where the line falls between *those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession*, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern (emphasis added).

Keller at 2237

Thus, under *Keller* unified state bar activities *other than* lawyer discipline or ethics can justify the existence of the unified bar. These activities must: (1) "involve the State's interest in regulating the legal profession and improving

the quality of legal services"; or (2) be "activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession."

Recommendations 3.1(b)-(g) establish new programs that can be conducted by unified state bar associations. These new programs are essential components of the expanded system of lawyer regulation recommended by the Commission. As such, they fall within the requirements of *Keller*.

Therefore, the recommendation in no way threatens the unified bar's existence under the rule of *Keller*. To the contrary, the expanded system of regulation proposed by the Commission expands the justification for the unified bar's existence under *Keller*.

Recommendation 6
Independence of Disciplinary Counsel

6.1 The Court alone should appoint and remove disciplinary counsel and should provide sufficient authority for prosecutorial independence and discretion. The Court should also promulgate rules providing that disciplinary counsel shall:

> **(a) have authority to employ and terminate staff, formulate a budget and approve expenditures subject only to the authority of the Court;**
>
> **(b) have authority, in cases involving allegations of minor incompetence, neglect, or misconduct, to resolve a matter with the consent of the respondent by administrative procedures established by the Court;**

(c) have authority to appeal a decision of a hearing committee or the disciplinary board;

(d) be compensated sufficiently to attract competent counsel and retain experienced counsel; and

(e) be prohibited from providing advisory ethics opinions, either orally or in writing.

6.2 The Court should adopt a rule providing that no disciplinary adjudicative official (including hearing committee members, disciplinary board members, or members of the Court) shall communicate ex parte with disciplinary counsel regarding an ongoing investigation or disciplinary matter, except about administrative matters or to report information alleging the misconduct of a lawyer.

Comments

This recommendation presumes the existence of a full-time disciplinary counsel with statewide jurisdiction. Disciplinary counsel should be insulated from political pressure from the public, members of the bar, and adjudicative officials of the disciplinary agency including members of the Court in order to provide effective and fair enforcement of the rules of professional conduct. Under the provisions of ABA MRLDE 4A, disciplinary counsel is appointed by the state discipline board. However, the Commission has received evidence that this arrangement can inhibit disciplinary counsel from appealing board decisions or otherwise disputing disciplinary policy set by the board. The National Organization of Bar Counsel has reported to the Commission several instances where

control by state bar officials and state discipline board officials over disciplinary counsel's budgets, personnel, and decisions to prosecute have muzzled experienced disciplinary counsel and, in some instances, caused them to resign.

The Commission believes that, subject only to removal by the Court, disciplinary counsel should be completely independent. Consistent with the authority to dismiss complaints, disciplinary counsel should have authority to divert cases involving allegations of minor misconduct, minor incompetence, and minor neglect to administrative, non-disciplinary processes established by the Court. If the respondent lawyer fails to comply with the agreement diverting the cases to another process, the disciplinary counsel can resume disciplinary proceedings. *See* Recommendation 9.

Disciplinary counsel should be compensated sufficiently to attract competent new lawyers as well as to attract and retain experienced lawyers. The Commission believes it is important that agencies with several staff counsel should attempt to balance experienced with inexperienced lawyers. A proper balance supplies both continuity and fresh perspective to the agency.

Many disciplinary counsel provide advisory opinions to members of the bar as a service. This diverts resources away from the detection and adjudication of misconduct. Ethics opinions are more appropriately provided by a committee of the Court, bar associations, or by the state bar's general counsel.

To be fully independent, disciplinary counsel should not perform services of general counsel to the bar and should not use the title "bar counsel."

Legislative History of Recommendation 6

The ABA House of Delegates amended the Commission's original recommendation 6.1. The Commission recommended that disciplinary counsel's independence should be strengthened by permitting the state high court to remove disciplinary counsel only for cause, not at will. The Commission's original recommendation stated:

6.1 The Court alone should appoint and for cause remove disciplinary counsel and should provide sufficient authority for prosecutorial independence and discretion.

The House voted to delete the words "for cause" from the recommendation.

A second change to Recommendation 6 was proposed by the Commission itself. The Commission's original recommendation had included as 6.1(b) the recommendation that disciplinary counsel shall:

(b) have authority to determine after investigation whether probable cause exists to believe misconduct has been committed and to dismiss a case or file formal charges against respondent lawyers;

The Commission's commentary on 6.1(b) in the December 1991 Report to the House of Delegates stated:

Disciplinary counsel should have full prosecutorial discretion, like that of criminal prosecutors in many states, to determine probable cause and to file formal charges without seeking the approval of a hearing committee member. This is contrary to existing provisions of ABA MRLDE 11B(3). Some states in fact still engage in grand jury style procedures or use three member committees to determine probable cause. This tremendous expenditure of

resources wastes time and money to make a decision that is clearly within the competence of any experienced disciplinary counsel. The right of complainants to appeal, as we recommend elsewhere, and of hearing committees to dismiss cases at hearing are more than adequate to check and balance prosecutorial discretion to file charges. If a state's highest court lacks confidence in the disciplinary counsel's competence to make decisions to charge, a new disciplinary counsel should be appointed rather than relying on a wasteful indictment procedure.

Prior to the debate in the House, the Commission withdrew this proposal due to strong opposition to prosecutorial independence to file formal charges. It still remains ABA policy that disciplinary counsel has authority to dismiss a case after investigation. *See* MRLDE 11B.

INCREASING PUBLIC CONFIDENCE IN THE DISCIPLINARY SYSTEM

The Commission is convinced that secrecy in discipline proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems. Because it engenders such distrust, secrecy does great harm to the reputation of the profession. The public's expectation of government and especially of judicial proceedings is that they will be open to the public, on the public record, and that the public and media will be able to freely comment on the proceedings. The public does not accept the profession's claims that lawyers' reputations are so fragile that they must be shielded from false complaints by special secret proceedings. The irony that lawyers are protected by secret proceedings while earning their livelihoods in an open system of justice is not lost on the public. On the

contrary it is a source of great antipathy toward the profession.

* * *

APPENDIX Q

[LOGO]

FLORIDA LAWYERS ASSISTANCE, INC.
20th ANNUAL WORKSHOP & SEMINAR

FRIDAY-SATURDAY, JULY 28-29, 2006

PREREGISTRATION FEE (by 7/1/06)	$ 140.00
REGISTRATION FEE (After the 1st)	$ 155.00
GUEST FEES	$ 60.00

SCHOLARSHIPS ARE AVAILABLE ON A QUALIFYING BASIS REQUESTS MUST BE IN WRITING AND FAXED TO FLA AT (954) 568-0803

---

8 CLE CREDITS (Applied For) INCLUDING
2 HOURS MENTAL HEALTH AWARENESS
4 HOURS SUBSTANCE ABUSE

CEU's APPLIED FOR

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851 GULF SHORE BLVD. NORTH
NAPLES, FLORIDA 34102
TEL: (800) 237-7600
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PLEASE MAKE YOUR RESERVATIONS
BEFORE JUNE 30, 2006

MENTAL HEALTH AND SUBSTANCE ABUSE EDUCATION FOR LAWYERS JULY 28, 2006

1:00-1:15 ***WELCOME/INTRODUCTIONS.*** **Michael J. Cohen, Esq., CEAP, Executive Director, Florida Lawyers Assistance, Inc.**

1:15- 2:45 ***ASK THE EXPERTS!*** **The Hon. Stanford Blake, 11th Judicial Circuit Court; Stafford Henry, M.D., Psychiatrist; John Eostace, M.D., ASAM, Addictionologist; Jack Weiss, Esq. Attorney & former Bar Counsel; Steven Pinkert, Esq., M.D., Attorney, Michael Cohen, Esq., CEAP, FLA Executive Director.** *A panel of experts will answer your questions on addiction, mental health, bar admissions, and discipline. (Questions may be submitted in advance and will be read anonymously.* ****See registration form.)***

2:45-3:00 ***BREAK***

3:00-4:00 ***THE ROLE OF NEUROFEEDBACK IN ADDICTION TREATMENT.*** **Tim Sweeney, Esq., CJAC; Thomas Daley, EEG/QEG Specialist, Healthcare Connection of Tampa.** *In addition to the primary benefit of reducing urges and cravings, neurofeedback and peripheral feedback are extremely useful in improving concentration and controlling racing thoughts. This and other aspects of the technology will be demonstrated by use of the actual equipment with a volunteer.*

4:00-4:15 ***BREAK***

4:15-5:15 ***INTERVENTION:*** **John Southworth, CAC; Michael Walsh, Southworth Associates.** *Two nationally recognized experts explain how the "coaching" process combines the best*

of three models of intervention. Coaching involves a firm, but compassionate and non-adversarial intervention style, and fosters collaboration between the family or firm and the individual without fostering guilt and blame.

6:00-7:30 ***DINNER, RECOGNITION OF VOLUNTEERS, and RECOVERY SPEAKER***

8:00-9:00 ***RECOVERY MEETINGS***

JULY 29, 2006

10:00-10:30 ***BREAKFAST BUFFET ON THE GULF***

8:30-10:00 ***FLORIDA BAR DISCIPLINE:*** **The Honorable Stanford Blake, 11th Judicial Circuit Court; William Mulligan, Esq., Bar Counsel, The Florida Bar (Miami Branch Office); Steven J. Pinkert, Esq., M.D.** *A mock Bar hearing before a Referee to determine discipline in a case involving rules violations, substance abuse/mental health, and recovery issues.*

10:00-10:30 ***BREAK***

10:30-12:00 ***THE TWELVE-STEP PATH TO RECOVERY: THE MEDICAL, PSYCHOLOGICAL, AND SPIRITUAL VIEWS (BODY, MIND AND, SPIRIT).*** **Rich Beach, M.D., FASAM, Medical Director, Twelve Oaks Treatment and Recovery Center.** *During almost twenty years in addiction medicine, Dr. Beach has evaluated and treated hundreds of individuals, including numerous doctors, lawyers and other professionals. In this presentation he shares his view on addiction, treatment and recovery in a presentation that will*

provide ideas and insights into creating a more satisfying life and career.

12:00-12:15 ***WORKSHOP WRAP-UP.*** **Judith Rushlow, J.D., CAC, Assistant Director, FLA**